

THOMAS & BELLOT'S
LEADING CASES
IN
CONSTITUTIONAL LAW

WITH INTRODUCTION AND NOTES.

SIXTH EDITION

BY

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PREFACE

TO THE SIXTH EDITION

THE demand for a new edition has encouraged the Publishers to allow me to enlarge the scope of this little book. I have therefore taken advantage of their indulgence by adding several classes of cases with which students of Constitutional Law should be familiar. The number of Leading Cases has been increased by sixty-five, whilst reference is made to one hundred and forty-three additional subsidiary cases. The Introduction has been expanded.

The arrangement of this book has been the subject of some criticism, but as students have become accustomed to it I thought it wiser not to disturb it. I am quite aware a more scientific arrangement is possible, but, after all, the cases are there and can readily be found. It may also be objected that the treatment of cases is too full, and that students should be encouraged rather to read the Reports. But, whilst fully alive to the desirability of this, I know from my own experience as a teacher that a large number of students find it physically impossible to visit a law library. I have

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therefore, wherever possible, given the *ipsissima verba* of the Judges rather than a summary of their decisions.

HUGH H. L. BELLOT.

2 KING'S BENCH WALK,
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June, 1927

PREFACE

TO THE FIFTH EDITION.

IN the third and fourth editions of this work the late editor, Mr. Charles L. Attenborough, whilst adding largely to the Notes refrained from any addition to the Leading Cases—in fact he eliminated a few, which did not appear to him entitled to be called “leading.” Since the fourth edition appeared in 1908, a considerable number of highly important constitutional issues has been raised in the Courts, due in a large measure to the War of 1914. Within the limits of space and time allotted to me, I have endeavoured to bring this little book up to date by including some of the most important of these cases; by adding some pre-war cases overlooked in previous editions; by appending to both classes of cases explanatory notes; by amplifying the existing notes where necessary, and by deleting some statements which appeared incorrect. I have also re-arranged the cases dealing with the Liability of the Executive and the Liberty of the Subject. Under the title “Superior Orders,” I have added the cases to which the War gave prominence. The Introduction has been almost entirely re-written.

HUGH H. L. BELLOT.

2 KING'S BENCH WALK,
TEMPLE.

June, 1924

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INTRODUCTION.

The Nature of Constitutional Law.—It has been said of Constitutional Law, as it has been said of International Law, that it is not law at all. This at once raises the question, "What is law?" Following Austin's definition of law in the strict sense of the term, "as rules laid down for an intelligent being by an intelligent being," Holland defines a law in the proper sense of the term as "a general rule of human action, taking cognisance only of external acts, enforced by a determinate authority, which authority is human, and among human authorities is that which is paramount in a political society." In other words, "a general rule of external human actions enforced by a sovereign political authority." A somewhat shorter definition is that by Frederic Harrison. "Law," he says, "is a general rule of external human action, which the sovereign power will cause to be respected by its own Courts," or, negatively, "nothing is law which the sovereign power will not enforce in its own tribunals."

It will have been observed that Holland's definition of law, which he terms "Positive Law," contains several elements. First, the rule must be of general application, commanding acts or forbearances addressed to all the members of a class. Secondly, law deals only with the external acts of the will. Thirdly, these rules will be enforced by a determinate human authority. Every command issued by such authority is accompanied by a *sanction*, a term used to express the evil which will follow if the command is disobeyed. Finally, such authority must be that which in any given human political society is paramount to all other authorities within or without such society, that is to say, it must be the sovereign power. Austin has defined a sovereign power as that which "is not in a habit of obedience to

any determinate human superior, while it is itself the determinate and common superior to which the bulk of a subject society is in the habit of obedience. Sovereign power, therefore, has a double aspect. It is independent of all control from without; it is paramount over all action within.

These definitions, however, are not accepted by everyone. Maine has shown that historically they are unsound. He maintained that usages which, prior to any law-making authority or anything in the nature of a Court of law as we understand the terms, were in fact observed by the common consent of the community, were just as much law as Acts of Parliament or judicial decisions are now. Oppenheim, Sir Frederick Pollock and Professor Vinogradoff agree with him. "These usages," says the latter, "were in fact enforced by the public opinion of the community with a stringency as potent, if not more potent, than that now exercised by modern law Courts, backed up by all the forces of a modern State." Oppenheim defines law as "a body of rules for human conduct within a community which by common consent will be enforced by external power."

The most conspicuous modern example of customary law is the Common Law of England, or, as it is sometimes called, "the custom of the realm." Although Holland denies to custom the title of law until it has received recognition from Parliament or from the Courts, yet he admits that when recognised such recognition has retrospective effect, implying that the custom was law before it received the stamp of legislative or judicial interpretation. This is practically an admission that a custom which is generally observed and enforced by the external power or public opinion of the community in which it prevails is law until Parliament or the Courts otherwise declare. Nevertheless, the distinction between a usage and a legal custom as understood in the strict sense in English law must be drawn. A usage, before it can become a legal custom must conform to certain tests. It must be certain; continuous, have existed from time

immemorial, must not be unreasonable; must be compulsory, and must be consistent

The source of all law is recognition, or consent, express or implied. It is expressed by Acts of Parliament and judicial decisions. It is implied by customs which are habitually observed and which are tolerated by the sovereign authority. Two theories are held as to adjudication as a cause of law—the one, that the Judges only declare the law—they do not legislate, the other, that although they profess not to make any alteration in the existing law, they do in fact, imperceptibly perhaps, as a rule bring the law into conformity with modern opinion. Under the Anglo-American legal systems their decisions are regarded as authoritative declarations of the law until reversed by the Legislature.

We may now ask what is meant by the law of the Constitution of a country. "It means," says Paley, "so much of its law as relates to the designation and form of the legislature, the rights and functions of the several parts of the legislative body, the construction, office and jurisdiction of Courts of justice. The Constitution is one principal division, section or title of the code of public laws, distinguished from the rest only by the superior importance of the subject of which it treats"¹

According to Dicey, Constitutional Law includes "all rules which directly or indirectly affect the distribution or exercise of the sovereign power." These rules, however, although classed by Dicey under the term "Constitutional Law," include not only laws in the juristic sense—*i e*, Positive Laws, which he terms "the Law of the Constitution"—but also rules which are not laws properly so called, which he calls "the Conventions of the Constitution," or "Constitutional morality." In his view nothing is law but that which will be enforced by the Courts. In this he follows Frederic Harrison. Consequently he considers the second set of rules "consisting of conventions, understandings, habits or practices, which, though they may regulate the conduct of the sovereign power, of the

¹ Moral Philosophy vi., c vii

ministry or of other officials since they are not enforced by the Courts," are not really laws at all. But whilst the Courts will not directly enforce the conventions of the Constitution they will, in the case of violation of some of them, enforce them indirectly. This is what Dicey means when he says that the conventions are ultimately dependent on the law of the land. For instance, if the Ministry of the day persisted in acting in direct opposition to the will of the House of Commons, the latter, by refusing to pass the annual Mutiny Act or the Appropriation Acts, would drive them if they continued in office into a course of illegal actions which would eventually bring them into conflict with the Courts. The true sanction, therefore, of the Conventions is, Dicey contends, not public opinion, but the law of the land itself.

Although, as Lowell points out, this may be the ultimate sanction, it is not in fact the real motive. The ultimate sanctions of the law are not usually present in the minds of men in English public life. The Conventions are obeyed because they express the common purpose of the community.² Dicey's division of Constitutional Law into law which is true law and law which is not law at all is a contradiction in terms and in conflict with his definition of law. And his attempt to confer upon some Conventions the title of true law, because they may indirectly be enforced by the Courts, is not very happy. If, however, Oppenheim's definition of law is accepted, the Conventions are customary law—i.e., are rules which by the common consent of the community are enforced by external power. Anson's title of his treatise, "*The Law and Custom of the Constitution*," in which he does not attempt any definition, would appear to be the better description of this branch of public law.

Sovereignty.—This question is too controversial for detailed examination here. We need only note that in the seventeenth century there were three competitors for

² Government of England 1, 10-3

the supreme power in the State—the monarch, Parliament and the lawyers. According to the mediæval theory the law was supreme. Even the King, as Bracton taught, was bound to obey the law. Coke, C J, claimed that the Judges were entitled to hold a statute void, either because it was against reason and natural law, or because it trenched on the royal prerogative. “The Common Law,” he said in *Bonham’s Case*, 8 Rep 118, “will control the Acts of Parliament and sometimes adjudge them to be utterly void.” Ellesmere, L C, in his “Observations on the Reports,” attempted to controvert this proposition, but it appears that two of the Judges agreed with Coke. The proposition is supported by many authorities both prior and subsequent to *Bonham’s Case*. In 1618, for instance, in *Day v Savage*, Hobart’s Rep 97, it was declared by the Court of Common Pleas that “an Act of Parliament made against natural equity so as to make a man a Judge in his own case is void in itself, for *jura naturæ sunt immutabilia* and they are *leges legum*.” Nearly a century later Holt, C J, declared that “what my Lord Coke says in *Dr Bonham’s Case* is far from extravagancy, for it is a very reasonable and true saying that if an Act of Parliament should ordain the same person party and Judge, or, which is the same thing, Judge in his own cause, it would be a void Act of Parliament.” *City of London v Wood*, (1701), 12 Mod 669. And in 1745, in *Omychund v Barker*, 1 Atkyn, at pp 32-3, Lord Mansfield, then Solicitor-General, in the course of his argument, said “A statute very seldom takes in all cases, therefore the Common Law that works itself pure by rules drawn from the fountain of justice is for that reason superior to an Act of Parliament.” The Court, consisting of Hardwicke, L C., Lee, C J, Willes, C J, and Parker, C.B, agreed with this doctrine and allowed certain evidence to be given although this was contrary to the statutes made on that behalf, citing in support the case of *Wells v Williams* (1697), 1 Ld Raym 282, where the Court allowed an alien enemy, commorant here

by the King's licence, to sue, although this was contrary to the statute. The doctrine was successfully relied upon in 1823 in *Stewart v Lawton*, and it was not until 1871 that it was expressly rejected by the Court in *Lee v Bude and Torrington Ry. Co*, 6 C P, at p 582. And it was upheld, up to the beginning of the nineteenth century, by statesmen such as Lord Camden, Pitt, and the Earl of Carnarvon. It is true that the fact of Parliamentary supremacy was established long before the theory found expression. The fact was established by the Declaration of Parliament of May 27, 1642, in answer to the King's Proclamation forbidding his subjects to obey the Parliament's order for mustering the militia. There was no other alternative. But the men who destroyed the theory of the Divine Right of Kings had no intention of substituting for it the Divine Right of Parliament. They were for the most part imbued with the traditional conception of a law superior to any sovereign power. As was aptly said in the House of Commons in 1675, "Where supremacy and inferiority go together, there is no remedy." The theory of Parliamentary supremacy was only fully developed by Bentham and his successor, Austin, and only generally accepted in the nineteenth century. It was responsible for the loss of the New England Colonies and for the Irish trouble. Although the theory is still maintained, no Government would dare to apply it to any of the Dominions. The old doctrine, however, of the supremacy of the law—the Rule of Law—was carried across the Atlantic and lies at the root of the American Constitution, whereby a statute contrary to the principles of the Constitution may be declared unconstitutional and consequently void, whereas in Great Britain an Act of Parliament cannot now be declared unconstitutional by the Courts, and can only be repealed by another Act of Parliament. Whilst all agree that the *legal* sovereignty lies in the King in Parliament, opinion is divided as to the place of *political* sovereignty. Some would assign it to the representatives of the House of Commons, others to the electorate, and

others to the people at large. But wherever it resides, it is the ultimate supreme power and the Government is its agent. •

An omnipotent Legislature, however, whether it represents a minority or a majority of the people, may be—and, indeed, frequently has been—as despotic as any absolute monarch. A majority, however large, is not entitled to override the fundamental rights of the individual—rights to life, liberty and property. In the United States and in many other modern States this protection of fundamental rights has been put into the written Constitution. This conception was derived from the English Common Law, which guaranteed a similar protection under an unwritten Constitution. The spirit of the Common Law, said Secretary of State Hughes in his address to the American Bar Association in Westminster Hall on July 21, 1924, was the guardian of their political and civil rights. This spirit, he said, “is opposed to those insidious encroachments upon liberty which take the form of uncontrolled administrative authority. There is still the need to recognise the ancient right, and it is the most precious right of democracy—the right to be governed by law and not by officials—the right to reasonable, definite and proclaimed standards which the citizen can invoke against malevolence and caprice.” Wherever the Parliamentary system prevails, it is now upon its trial. If democracy, in President Wilson’s words, is to be made safe for the people, it must be made subject to law. The unbridled exercise of power by a majority of the people through a party majority in Parliament overriding the fundamental rights of the individual can only result in the destruction of constitutional government. Unless the Rule of Law prevails and dominates the spirit of the people, modern democracy is doomed.³

The main functions of the Government are threefold: Legislative, Executive, and Judicial. But in the

³ See my article, “The Rule of Law,” in “The Quarterly Review,” April, 1926.

exercise of those functions there is no clear-cut division. Parliament is at once a legislative and judicial body, and its title, "The High Court of Parliament," and the fact that an Act is technically a *judicium*, indicate that its principal business was originally judicial. The House of Lords still retains its judicial function, sitting for judicial purposes as the final Court of Appeal. And the Judges, although they do not openly admit it, do in fact legislate, although not, perhaps, to the same extent as formerly.⁴

Of these functions, the Legislative is carried out in the main by Parliament itself, although certain powers of legislation are delegated to the Crown in Council, to subordinate officers, and even to certain private corporations. These delegations to statutory authorities have of late assumed a mass of enormous bulk and grave portent.⁵ The Executive function, on the other hand, is exercised entirely by delegates, under the direction of the Crown.

Briefly, then, we may conveniently say that the Legislative function is the supreme power of making laws, the Executive function is the supreme power of executing them, and the Judicial function is the supreme power of interpreting them when called upon.

We may now proceed to examine the judicial decisions for illustrations and proofs of the constitutional limitations of these several branches of the supreme power, taking them in the order here laid down.

I THE LEGISLATIVE FUNCTION

1 *The Crown.*

The legislative function properly belongs to the King in Parliament, and no single branch may normally legislate without the concurrence of the other two. There is,

⁴ "The whole of the rules of equity and nine-tenths of the rules of the Common Law have in fact been made by the Judges". Mellish, L.J., in *Allen v. Jackson*, 1 Ch. D. 405.

⁵ See Cecil T. Carr, "Delegated Legislation".

however, an important exception. Under the Parliament Act, 1911 (1 & 2 Geo 5, c 13), the Crown and the Commons can enact without the co-operation of the House of Lords. The Executive has a limited power of legislation by Orders in Council, etc., but only when such power has been expressly delegated by Parliament.⁶

* Speaking generally, and leaving out of view such special emergencies as the Civil War or the Revolution, the majority of the attempts at independent legislation has been made by the highest branch of the Legislature—the Crown.

The Crown has attempted to exercise a power of independent legislation in virtue of an asserted prerogative by licence and dispensation, or by proclamation and ordinance. *Case of Monopolies*, *Case of Proclamations*, *Att-Gen v Brown*, and *Frailey v. Charlton*. It has also claimed the right of suspending and dispensing with laws passed by Parliament. *Thomas v Sorrell* and *Godden v Hales* were cases of particular dispensations, while the *Case of the Seven Bishops* illustrates the attempt to suspend certain penal statutes by royal proclamation. The power of taxation is constitutionally a department of the legislative power. Attempts on the part of the Crown to exercise it were seen in *Bate's Case* (*the Case of Impositions*), where the King imposed a customs duty without consent of Parliament, and *Re v. Hampden* (*the Case of Ship Money*), where writs were issued for the collection of money without Parliamentary authority. *Bowles v. Bank of England* is a modern illustration of the attempt to levy taxation in an irregular manner. The procedure of deducting income tax under a resolution of the House of Commons was regularised by the Provisional Collection of Revenue Act, 1913 (3 Geo 5, c 3). Other attempts to levy taxes without the authority of Parliament are illustrated by *Att-Gen v Wilts United Dairies, Ltd*, and *Brocklebank & Co, Ltd v. The King*.

⁶ See Carr's "Delegated Legislation."

In some of these cases the decision of the Courts was for the Crown, and the principle that the Crown may not legislate nor impose, save with the consent of Parliament, was not established without violent struggles

ii. *Parliament*

Some of the cases noticed under this heading illustrate unconstitutional attempts by the House of Commons to exercise exclusive authority in relation to its own constitution by seeking to establish rules of privilege, which led to collisions with the Courts and with the House of Lords

It was admitted that the House of Commons had a right to determine all matters touching the election of its own members. But the attempt to enlarge this privilege and to determine the rights of electors led, in more than one case, to a conflict between the House of Commons on the one side and the Courts, together with the House of Lords, on the other *Ashby v White*

The undoubted privileges of the two Houses, however, are very large. Either House may commit for breach of its privileges *Lord Shaftesbury's Case*, *Burdett v Abbot*. Parliamentary freedom of speech is illustrated by *Rex v Eliot*, *Holles and Valentine*, and freedom from arrest by *Goudy v Duncombe*, though the privilege has been held not to protect a Member for what he does out of Parliament

Again, in the case of *Stockdale v Hansard* a limit was set to the privilege of Parliament, and it was decided that it may not authorise libellous matter to be published. A statute was passed to meet this difficulty. But the case is decisive of the right of the Courts to inquire into matters of Parliamentary privilege

The Courts will not inquire into the ground of a commitment *Sheriff of Middlesex's Case*. Neither will the Courts interfere with the entire control of the House over its own proceedings. *Bradlaugh v Gossett*. But this power of commitment is not necessarily inherent in all

Colonial Legislatures *Doyle v Falconer*, *Fielding and others v Thomas*, and *Harnett v Crick*.

II. THE EXECUTIVE FUNCTION.

1. *The Crown*

The Crown is the head of the executive power, and as such is entitled to allegiance, the nature and limitations of which are considered in *Calvin's Case*, which leads naturally to the consideration of nationality and the status of aliens. The Crown is also invested with certain high prerogatives, though they are of course subject to the law of the land.

With regard, indeed, to Colonies and Dependencies obtained by conquest, as opposed to those acquired by occupancy or settlement, the Crown (subject to the paramount authority of Parliament) possesses the whole authority of legislation. It is limited, however, by this restriction, that when it has once granted a Legislature to such a Colony it cannot afterwards exercise there any legislative power. *Campbell v Hall*

It is a fundamental principle of the Common Law that where there is a right there is also a remedy for any infringement of that right. But when we suffer an injury at the hands of the Executive or some Department of State and seek a remedy, we are met with the maxim "The King can do no wrong," and therefore no action lies. Unless, therefore a right of action is expressly given by statute or the Department is incorporated, no action lies against the Crown or against any of its Departments. In the case of some more recently reconstructed or newly created Departments such a right has, however, been conferred. Although the Sovereign is immune, his Ministers are not, whether they acted under his express orders or not. *Danby's Case*.

But although the subject may not bring an action

against the King, he may present a petition in respect of certain rights illegally invaded by the Crown

The remedy only arises when the rights of the Crown are directly involved. The only cases in which a petition of right is available are where the lands or goods or money of a subject have found their way into the possession of the Crown, and the purpose of the petition is to obtain restitution, or, if restitution cannot be given, compensation in money, or when a claim for a liquidated sum arises out of a contract, as for goods supplied to the Crown or to the public services or for unliquidated damages for breach of contract for dues and duties which have been paid to the Crown. *The Saltpetre Case*, *Re A Petition of Right*, *Re De Keyser's Royal Hotel, Ltd*, *Robinson & Co, Ltd v The King*, *Lord Mayor, etc., of Dublin v The King*, *Campbell v Hall*; *Bankers' Case*; *Macbeath v Haldimand*, and *Gidley v Lord Palmerston*.

Where Government officials or Departments of State have been invested with the attributes of a corporation they may be sued: *Graham v Commissioners of Public Works*. By statute some Departments are liable to be sued in both contract and tort. All public servants are liable for their criminal acts. *R v Hall*. Governors of colonies are not viceroys, and their powers are limited by the express terms of their commissions. They may be sued, therefore, either in their own Courts or in the English Courts. *Mostyn v Fabrigas*, *Hill v. Bigge*; *Phillips v Eyre*. They will not be held responsible, however, for an act of State. *Musgrave v Pulido*. A viceroy, having a fuller delegation of royal authority, cannot be sued at all in his own Courts for an act done by him in his official capacity. *Luby v Lord Wodehouse*.

But a petition of right does not lie in respect of a claim founded upon tort nor for compensation for a wrongful act done by a servant of the Crown in the supposed performance of his duty. *Lane v Cotton*, *Viscount Canterbury v Att.-Gen.*, *Rogers v Dutt*, *Tobin v The Queen*; *Grant v Secretary of State for India*; and *Bainbridge v Postmaster-General*.

ii *Servants of the Crown*

Whilst the subject is protected against the improper exercise of the powers entrusted to servants of the Crown, the latter, when acting in their official capacity, enjoy certain immunities. The principal instrument under the Common Law for the protection of the liberty of the subject is the writ of *habeas corpus ad subjiendum*, which ensures that any person who is alleged to be illegally detained or imprisoned shall be produced in Court and the cause of his detention then and there subjected to inquiry. The writ is of great antiquity, and appears to have been first used in personal actions in which it was sought to compel the appearance of the defendant. But its use by the subject against the Crown is not known till the time of the Tudors. It was the forced loan of 1626 which raised the question of the power of the King to detain in confinement without cause shown, and which resulted in the Petition of Right. *Darnel's Case*. The right to the writ became statutory by 16 Car. 1, c. 10 (1640), but illegal detentions were still common. After a long Parliamentary struggle the Habeas Corpus Act, 1679 (31 Car. 2, c. 2), was passed. This statute introduced no new principles. It conferred no new right. It did not even affirm the Common Law right. It merely provided machinery for more effectually enforcing the right of persons imprisoned for any crime or alleged criminal offence, except treason or felony. The Habeas Corpus Act, 1816 (56 Geo. 3, c. 100), further simplified the procedure. Until the war of 1914 the Common Law right to the writ had never been denied or suspended by Parliament. Only partial suspension of the Habeas Corpus Acts had taken place. But in *Rex v. Halliday, Ex p. Zadig*, the question was raised whether under the Defence of the Realm Acts the power of suspending the right could be delegated by Parliament to the Executive. In connection with this subject the cases of *Stanley v. Harvey*, *Sommersett's Case*, *Forbes v. Cochrane* and *Rex v. Allan* exhibit the attitude of the law

towards slavery, whilst *Pigg v Caley* is the last case in which villeinage was alleged in the Courts. *Re Castioni* is an authority on the power of the Executive to extradite aliens, whilst *Rex v Broadfoot* illustrates an exception to the liberty of the subject in which the right of the Crown to impress sailors was upheld.

Another valuable guarantee of the rights of the subject against the Executive consists in the doctrine of the illegality of general warrants, here illustrated by *Leach v Money*, *Wilkes v Wood*, and *Entick v Carrington*. In the last two cases the plaintiff recovered damages against the agent of the Executive.

It is an important constitutional principle that only soldiers are subject to military law. *Grant v Gould*. As to the relations between officers in the military and naval services, and their liability to their subordinates, they are governed by the principle that those who have voluntarily entered these services are bound by their regulations. The Courts will, generally speaking, decline to discuss essentially military or naval matters. No remedy is obtainable in a civil Court for damage, even maliciously caused to his subordinates, by a superior officer acting within the scope of his duties. *Sutton v Johnstone*, *Dawkins v Lord Rokeby*, *Fraser v Hamilton*, *Fraser v. Balfour*. Nor are officers liable to outsiders for any injury done by them while properly acting in discharge of their duties. *Buron v Denman*. But they are liable for tortious acts done without authority. *Madrazo v Willes*.

The fundamental principle of Constitutional, as of International, Law that the order of the Crown or of a superior officer for the commission of an illegal act cannot be pleaded in bar, is illustrated by the cases of *Rex v Thomas*, *Keighly v Bell*, and *Reg v. Smith*.

III. THE JUDICIAL FUNCTION.

The integrity, and independence of our judicial system is secured in various ways. The Sovereign, although he is the fountain of justice and the Judges are regarded as his delegates, cannot personally determine causes *The Case of Prohibitions*. No jury is liable to be fined or otherwise punished for its finding *Flöjd v Barker*, *Bushell's Case*.

The existence of the jury itself, however, would seem to be threatened by a recent statute (10 & 11 Geo 5, c 81, s 2), and by an order of the Supreme Court issued in pursuance thereof (Ord XXXVI, r 6). Attention is directed to the seriousness of this by Bankes and Atkin, L JJ, in *Ford v Blurton* (*infra*, p 153).

The Judges are now independent of the Crown, since they can be removed only on an address of both Houses of Parliament. They are made independent of the people by not being civilly liable for any judicial act. *Hamond v Howell*; *Houlden v Smith*, *Anderson v Gorrie*. This extends even to a Judge acting without jurisdiction, unless he knew, or ought to have known, that he had no jurisdiction: *Calder v Halket*.

The same immunity is afforded to the parties and their advocates, and to the witnesses in all legal proceedings. *Astley v Younge*; *Munster v Lamb*; *Seaman v Netherclift*.

A group of cases is next presented illustrating the liberty of the Press, which is one of the strongest guarantees of constitutional rights. *Wason v. Walter* decides that Parliamentary proceedings may be fully reported: and *Usill v Hales* shows that this freedom covers also the reports of proceedings in Courts of Justice. This privilege, however, was held in *Davison v Duncan* not to extend to the proceedings of public meetings though now, by statute, protection has been accorded to newspapers in this respect also.¹

¹ Law of Libel Amendment Act, 1888 (51 & 52 Vict c. 64)

Under the title of " Offences against the State " are grouped a number of crimes which are directed against the Constitution. The crime of high treason by compassing the death of the King and levying war against him are illustrated by the cases of *Rex v Thistlewood*, better known as *The Cato Street Conspiracy*, *Reg v Frost*, *Reg v Smith O'Brien*, *The London Apprentices' Case* and *Burton's Case*, whilst *Rex v Vaughan*, *Rex v Lynch*, *Rex v Ahlers* and *Rex v Casement* illustrate the offence of adhering to the King's enemies. The intention to commit these crimes is evidenced by overt acts. What are overt acts are illustrated by *Lord Preston's Case*, *Harding's Case*, *The Case of Hugh Pine*, where the former decisions are passed in review by the Judges, and the *Case of Rex v Charnock*.

The highly technical offence of constructive treason is illustrated by the well-known cases of *Rex v Florence Hensey*, *Reg v Dammaree* and *Rex v Lord George Gordon*. The Treason Felony Act, 1848, was designed to mitigate the harshness of the law of treason and to avoid the barbarities inflicted upon offenders against some of its provisions. It does not, however, affect or repeal the Statute of Treason of 1351. *Reg. v Meany*, *Reg. v. Davitt and Wilson* and *Reg. v. Gallagher*, are instances of prosecutions under this statute.

✓ The offences of riot and unlawful assembly are illustrated by *Rex v. Birt*, *Rex v Fursey* and *Reg. v. Cunninghame Graham and Burns*, whilst the duties of magistrates in dealing with such disturbances of the peace are defined in *Rex v Pinney* and *Reg. v. Neale*. Under the sub-title of sedition, *Reg v Fussell*, *Reg. v. Jones* and *Reg. v Burns* are examples of seditious words; *Rex v Shipley*, *Rex v Stockdale*, *Rex v. Lambert and Perry*, *Rex v. Burdett*, *Rex v. Cobbett*, *Rex v Carlile* and *Rex v. Collins*, of seditious libel, and *Reg. v. Most*, of the offence under 24 & 25 Vict. c 100, of inciting to murder foreign sovereigns. *Rex v Redhead [Yorke]*, *Rex v Hunt*, *Reg. v. Vincent* and *Reg. v.*

O'Connell declare the principles underlying the notion of a seditious conspiracy In *Rex v Taylor*, *Reg v Bradlaugh*, *Reg v Ramsay and Foote* and *Bowman v Secular Society, Ltd*, the offence of blasphemy is defined and the question how far Christianity is part of the law of the land critically examined, whilst in *Reg. v Hicklin* the test to be applied to the offence of obscenity is determined Offences under the Official Secrets Act, 1911, are illustrated by *Rex v Olsson*, *Rex v Crisp and Homewood* and *Rex v Simington* Those branches of the law relating to trade unions and public order are illustrated by *Lyons v Wilkins*, *Linaker v Pilcher*, *Amalgamated Society of Railway Servants v Osborne*, *Vacher & Sons, Ltd v London Society of Compositors*, *Ware and De Freville v Motor Trade Association*, *Sloan v Macmillan* and *National Sailors' and Firemen's Union of Great Britain and Ireland v Reed*

✓ Under the title of "Judicial Control," *Rex v Askew* and *Croydon Corporation v. Croydon Rural District Council* explain the nature of the prerogative and statutory writs of *mandamus* respectively, whilst the prerogative writs of *certiorari*, prohibition and *quo warranto* are exemplified by *Reg v Surrey Justices*, *Mackonochie v Lord Penzance* and *Reg v McGowan* respectively

The Zamora definitely decided what had long been assumed—that a Prize Court was not bound by an Order in Council, and in *The Parlement Belge* the principle of the immunity of a foreign public vessel was laid down

✓ In *Walker v Baird* the treaty-making power of the Crown is discussed, and the principle declared that the Crown is not entitled by virtue of any provisions of a treaty not ratified by Parliament to modify the rights of the subject

✓ *The Case of the Bishop of Natal* decided that upon the creation of an independent Legislature in a Colony the Crown cannot establish a Metropolitan See or Province nor create a new Court with a new jurisdiction without Act of Parliament

Finally, in *Viscountess Rhondda's Claim*, the right of a peer to a writ of summons to the House of Lords is exhaustively discussed, and the claim of a peeress to a similar writ declared to be ill-founded. •

LEADING CASES.

GRANT OF MONOPOLIES.

The Case of Monopolies.

11 Rep. 85. (1602).

Case.] This was an action by Darcy, a groom of the privy chamber to Queen Elizabeth, against Allein, a haberdasher, for making playing-cards, for the exclusive importing and making of which Darcy held a patent from the Queen.

Two questions were argued at the bar: (1) Was the grant of sole making good? (2) Was the dispensation from the stat. 3 Edw. 4, c. 4, which imposed a penalty on importing cards, good?

It was argued for the defendant, and

Held by Popham, C.J., and the Court that: (1) The grant was a monopoly, and therefore void as against both common law and statutes, and also as against public policy; (2) The dispensation was also against law. The King may dispense with particular persons, but may not dispense for a private gain with an Act passed *pro bono publico*.

Judgment for the defendant.

Note—Coke adds that “our lord the king that now is,” in his “Declaration,” printed in 1610, has published that “monopolies are things against the laws of this realm” In 1623 a statute was passed declaratory of the law, which, however, reserved the rights of corporations and of “any companies or societies of merchants” (21 Ja 1, c. 3, s. 9), and continued for many years the subject of controversy

In 1683-5 the question was fully discussed in the *East India Co. v. Sandys*, when the grant of sole trading to the company was held good.¹

¹ 10 St. Tr. 371; Skinner, 132, 223.

The very elaborate judgment of *Jeffreys*, C J, was separately printed in 1689, and is spoken of by Macaulay as "able, if not conclusive." In 1694 the company obtained a further charter, upon which a resolution was carried by the House of Commons "that all subjects of England have equal right to trade to the East Indies unless prohibited by Act of Parliament,"² and this has ever since been considered to be the sound doctrine.

The statute of James I expressly provided that no declaration therein contained shall extend to any letters patent and grants of privilege to inventors for the term of fourteen years or under. This term may now be extended by the High Court of Justice for a further period of seven, or even, in exceptional cases, fourteen years.³

The statute did not create, but controlled, the power of the Crown in granting to the first inventor the privilege of the sole working and making of new manufactures, *Caldwell v. Vanvlassengen*.⁴

It was decided in the case of *Feather v. The Queen*, in 1865,⁵ that letters patent do not preclude the Crown from the use of the invention protected by the patent, even without the assent of or compensation made to the patentee, it has, however, since been enacted⁶ that a patent shall have to all intents the like effect as against His Majesty as it has against a subject, provided that any government department or its agents or contractors may at any time use the invention for the services of the Crown on such terms as may be agreed between the department and the patentee, or, in default of agreement, as may be settled by the Treasury after hearing all the parties interested.

² 5 Parl. Hist 828

³ 7 Edw 7, c 29, s 18

⁴ (1851), 9 Hare, 415, 21 L J Ch 97, 89 R. R. 513

⁵ 6 B & S 257, 35 L J Q B 200

⁶ 7 Edw 7, c 29, s 29

ROYAL PROCLAMATIONS.

The Case of Proclamations.

12 Rep. 74 (vl. 297); 2 St. Tr. 723. (1610.)

Case.] This arose out of the Petition of Grievances On September 20, 1610, *Coke*, as C J, was called before the Privy Council, and it was referred to him whether the King, by Proclamation, might prohibit new buildings in London, or the making of starch of wheat, these having been preferred to the King by the House of Commons as grievances and against law *Coke* asked leave to consider with his colleagues, since the questions were of great importance, and they concerned the answer of the King to the Commons It was afterwards:—

Resolved by the two Chief Justices, Chief Baron, and Baron Altham, upon conference, betwixt the Privy Council and them, that the King cannot by his Proclamation create any offence which was not an offence before, for then he might alter the law of the land in a high point; also that the law of England is divided into three parts, common law, statute law, and custom, but the King's Proclamation is none of them. Also it was resolved that the King hath no prerogative but that which the law of the land allows him. But the King, for prevention of offences, may by Proclamation admonish his subjects that they keep the laws, and do not offend them; upon punishment to be inflicted by the law.

Note—The legislative power originally resided in the King in Council, *e g*, the statutes *Quia Emptores* and *De Donis Conditionalibus*—twin pillars of real property law—were so passed in the reign of Edward I. And even after the introduction of Parliamentary legislation as we know it, there existed side by side a system of royal

legislation by Ordinances and later by Proclamations. In the 16th century the Commons were petitioners rather than legislators. These ordinances had the form of law, and by 31 Hen 8, c 8 (1539), the King was empowered, with the advice of his Council, to legislate by proclamations, which were "to be observed as though they were made by Act of Parliament," and offenders to pay such forfeitures and to suffer such imprisonment as should be expressed in the proclamations. Although repealed by 1 Edw 6, c 12, s 4, proclamations continued to be issued and enforced, but it was agreed by the Judges in the reign of Mary that the King may make a proclamation *quoad terrorem populi*, to put them in fear of his displeasure, but not to impose any fine, forfeiture or imprisonment; for no proclamation can make a new law but only confirm and ratify an ancient one¹. Notwithstanding this declaration and the opinion expressed by Coke and his fellow Judges in the above Case of Proclamations, mandates of this kind continued to be issued by the King in Council, and enforced by the Star Chamber until that Court was abolished in 1641.

It is of course still legal for the Crown to issue Proclamations, either when authorised by statute or for the enforcement of the existing law, but there appear to have been few instances of illegal proclamations since the abolition of the Court of Star Chamber, in which their observance was usually enforced. An instance, however, occurred in the year 1766, when, in a case of apparent urgent necessity and at a time when Parliament was not sitting, the King, on the advice of his ministers, laid an embargo by proclamation upon all ships laden with wheat or flour with a view to prevent exportation and to relieve the great scarcity caused by a bad harvest. With some difficulty Parliament was afterwards induced to pass an Act indemnifying the ministers and those who had taken part in enforcing this proclamation.

For a modern authority that the object of a Royal Proclamation is to make known the existing law, and that it can neither make nor unmake law, see *Ex p Chavasse, re Grazebrook*, 4 De G. J. & S., at p 652; 34 L J K. B. 17.

Att.-Gen. v. Brown.

[1920] 1 K. B. 773; [1921] 3 K. B. 29; 89 L. J. K. B. 1178;
90 L. J. K. B. 992; 36 T. L. R. 165.

Case.] By section 43 of the Customs Consolidation Act, 1876:
"The importation of arms, ammunition, gunpowder, or any

¹ Anson, Law and Custom of Constitution, 1, 340—6 (1922).

other goods may be prohibited by Proclamation or Order in Council." Under this section a number of proclamations were made during the war of 1914, the first of these being dated February 15, 1916. By the Prohibition of Import (No. 32) Proclamation, dated June 25, 1919, the importation into the United Kingdom of divers articles,* and amongst them chemicals of all descriptions, was prohibited except under licence from the Board of Trade. In August, 1919, six casks of pyrogallic acid were imported into the United Kingdom by the defendant without licence. The Crown claimed forfeiture of the casks. Pyrogallic acid is used in photography, and the Attorney-General argued that since photography is used in war, the acid was in the same category as arms, etc.

Judgment—To give effect to this contention, said *Sankey, J.*, would be straining language. It is hard to conceive any article which is not used in modern warfare or in the preparation of some article used therefor. The doctrine of *ejusdem generis* must be applied. The expression "any other goods" does not mean any other sort of goods, but means any other goods of the kind referred to in the previous words.

Consequently the section gives no power to prohibit the importation of any goods except arms, ammunition, gunpowder and any other goods of the same kind. If it had been desired to give the Executive an absolute prohibition in all cases there would have been no need to set out the words "arms, ammunition, gunpowder." The object would have been achieved by simply saying "The importation of any goods may be prohibited by Proclamation or Order in Council." The Act of 1876 replaced the Customs Act, 1853, which is the Magna Carta of Free Trade. "Could Parliament," asked the learned Judge, "ever have intended at the moment of the birth of free trade to hand over to the Executive an absolute power to prohibit the importation of every and any article and to do so by the addition of a few general words at the end of a category of particular goods?"

Held:—His Majesty had no power to make the Proclama-

tion in question and that it was illegal and invalid: judgment against the Crown with costs. The Crown appealed.

While the appeal was pending the Indemnify Act, 1920, was passed, and came into operation on August 6, 1920, which provided that any Proclamation or order in Council issued, under section 43 of the Act of 1876, during the war and before April 15, 1920, shall be deemed always to have been valid. The appeal was allowed on terms by consent as to costs and as to the appraised value of the goods

Frailey v. Charlton.

[1920] 1 K. B. 147; 88 L. J. K. B. 1285.

Case.] The respondent was charged with “knowingly harbouring prohibited goods” under section 186 of the Customs Consolidation Act, 1876. He had brought on board his ship while lying in the Thames preparatory to her departure for a foreign port a quantity of soap, which was intended for the use of the passengers on the voyage. By a Proclamation of May 10, 1917, as amended by an Order in Council of February 26, 1918, the export of soap from the United Kingdom was prohibited. The proclamation was issued in virtue of the Customs and Inland Revenue Act, 1879 (42 & 43 Vict. c. 21); the Exportation of Arms Act, 1900 (63 & 64 Vict. c. 44); the Customs (Exportation Restriction) Act, 1914 (5 Geo. 5, c. 2); and the Customs (War Powers) Act, 1915 (5 Geo. 5, c. 31). The respondent was not aware of the prohibition.

Judgment.—*Held* by *Reading*, C J, and *Darling* and *Avory*, JJ., that the ignorance of the respondent of the prohibition was a good defence. “In my view,” said Lord *Reading*, “the meaning of the Legislature was that no person should be convicted of an offence under section 186, or be subjected to the serious penalty which it imposed, unless the act complained of was done with intent to defraud His Majesty of duties and to evade the prohibition or restrictions applicable to the goods.”

CROWN—DISPENSING POWER.

Thomas v. Sorrell.Vaughan, 380—359. (1674.)

Case.] The plaintiff claimed a large sum of money from the defendant for selling wine on various occasions without a licence, contrary to stat 12, Car 2. The jury returned a special verdict, alleging that they found a patent of 9 Ja. 1 incorporating the Vintners' Company, with leave to sell wine *non obstante* the stat 7 Edw 6, which Act forbade the sale of wine without certain licences.

The chief question to be argued was the validity of these letters patent; and to "this dark learning of dispensations" *Vaughan*, C.J., applies himself at great length.

His judgment may be summarised as follows:—

He refers to an old rule laid down in a case of 11 Hen. 7, that with *malum prohibitum* by statute the King may dispense, but not with *malum in se*, but he points out that this rule had more confounded men's judgments on the subject than rectified them, inasmuch as every *malum* is in truth a *malum prohibitum* by some law. By a process of reasoning, by no means clear or easy to follow, he arrives at the conclusion that the King cannot dispense with any general penal law made for the general good or the good of a third party, but that he may dispense in the case of an offence against a law the breach of which would only affect the King himself and would not be to the particular damage of a third party. Adopting the words of Sir Wm. Anson,¹ "his conclusion seems to amount to this, that the King might dispense with an indi-

¹ Anson, *Law and Custom of Constitution*, 1, 349

vidual breach of a penal statute by which no man was injured, or with the continuous breach of a penal statute enacted for his exclusive benefit”

Judgment was given for the defendant, *i e.*, in favour of the validity of the patent.²

Godden v. Hales.

2 Shower, 475; 11 St. Tr. 1165. (1686.)

Case.] This was a collusive action, brought to establish the power of the King to grant a dispensation for a continuous breach of a general penal statute. The plaintiff sued Sir Edward Hales, who had been appointed colonel of a foot regiment, for neglecting to take the oaths of supremacy and allegiance and to receive the Sacrament, which he was bound to do as a military officer by the Test Act (25 Car. 2) He had been indicted and convicted at the Rochester assizes, and the present action was to recover the penalty of £500 provided by that statute

The defendant pleaded a dispensation from the King by his letters patent under the Great Seal discharging him from taking the oaths and receiving the Sacrament. The question was whether this dispensation constituted a good bar to the action

Judgment—Eleven Judges out of twelve concurred in holding that it did

It is a question of little difficulty. There is no law whatever but may be dispensed with by the supreme lawgiver; as the laws of God may be dispensed with by God Himself. The laws of England are the King’s laws; it is his inseparable prerogative to dispense with penal laws, in particular cases

² The law as here laid down agrees nearly with the view of Coke 1 Co Litt 120a; 3 Inst 154, 186 Blackstone observes that “The doctrine of *non obstante*, which sets the prerogative above the laws, was effectually demolished by the Bill of Rights at the Revolution, and abdicated Westminster Hall when King James abdicated the kingdom”: 1 Comm 342

and upon particular necessary reasons; and of those reasons and necessities the King himself is sole judge.

Judgment for the defendant.¹

Seven Bishops' Case.

12 *St. Tr.* 188; 3 *Mod.* 212; 2 *Phillips, S. T.* 259—355. (1688).

Case.] James II had ordered by proclamation that a Declaration of Indulgence in matters of religion should be read by the bishops and clergy in their churches, and that the bishops should distribute the Declaration through their dioceses to be so read.

Six of the bishops met at the archbishop's palace at Lambeth and drew a petition that the King would not insist upon their distributing and reading the Declaration, "especially because that Declaration is founded upon such a dispensing power, as hath been often declared illegal in parliament, and particularly in the years 1662 and 1672, and the beginning of your Majesty's reign"; and stating that they could not in prudence, honour, or conscience make themselves parties to it. This petition six of them presented to the King in person, who received it angrily. The same evening the petition was printed and published in every part of London by sympathisers of the bishops. Shortly afterwards the latter were summoned to appear before the Council to answer "matters of misdemeanour," and were told that a criminal information for libel would be exhibited against them in the King's Bench, and were called upon to enter into their recognisances to appear. This they refused to do, insisting upon their privileges as peers; and were accordingly committed to the Tower.

¹ The judgment of *Herbert, C J*, proceeded upon the most extravagant ideas of prerogative. Nevertheless, it is by no means evident, in the words of Hallam (3 *Const Hist Eng.* (8th ed.), 62), that this decision was against law. The dissentient Judge in this case was *Street*, and *Powell* is said to have doubted for a time, but to have afterwards concurred.

At the trial on June 29 they were charged upon an information by the Attorney-General with a conspiracy to diminish the royal authority, and in prosecution of this conspiracy with the writing and publishing of a certain "false, feigned, malicious, pernicious and seditious libel" They pleaded not guilty.

After much time had been wasted in attempts to prove the handwritings of the bishops, this was at last done by calling Blathwayt, a clerk of the Privy Council who had heard the bishops acknowledge their signatures to the King.

But the libel was charged to have been written in Middlesex, and this could not be proved—as it had in fact been written at Lambeth, in Surrey Accordingly Lord Sunderland was brought to prove a publication in Middlesex by the presentation to the King

The document was asserted by the prosecution to be a libel, because it urged that the Declaration was based upon an illegal power.

Counsel for the defence argued:—

1. That the petition was a perfectly innocent petition, presented by proper persons in a proper manner. The bishops are intrusted with the general care of the Church, and also by stat. 1 Eliz. c. 2 with the carrying out of that Act—the Act of Uniformity; and had a right to petition in this case. There is always a right to petition or appeal to the Crown when the King or his Ministers have done or are about to do anything contrary to law.

2. As to their questioning of the dispensing power, no such power exists. The declarations of Parliament sufficiently show this. In 1662, when King Charles wished to extend an indulgence to the Dissenters, it was asserted by Parliament that laws of uniformity "could not be dispensed with but by act of parliament." In 1672 when the King had actually issued such a Declaration, upon the remonstrance of Parliament he caused the said Declaration to be cancelled, and promised that it should not become a precedent. In 1685,

when the King announced that he had certain officers in his army "not qualified according to the late tests of their employments," Parliament passed an Act of Indemnity that "the continuance of them in their employments may not be taken to be dispensing with that law without act of parliament." Until the last King's time, the power of dispensing "never was pretended," on which point Somers, as junior counsel for the defence, quoted "the great case of *Thomas v. Sorrell*" to show that it was there agreed by all that there could be no *suspension* of an Act of Parliament but by the legislative power

The points urged by counsel for the Crown, which appear to have most substance in them, were that even if all the matters alleged in the petition were true that afforded no defence if, as they contended, the statements in the petition were libellous; as *e g.*, it would be libellous to allege in a petition to a Judge that his decision was illegal, and that the petitioner could not in honour, prudence, or conscience obey it, even though such decision was unjust.

That, in fact, the King's declaration was perfectly legal, the King having an especial power to issue proclamations and to make orders and constitutions in matters ecclesiastical, of which this was one.¹

The Solicitor-General and the Recorder even went so far as to deny the right of the bishops to petition the King at all, except in Parliament, but this contention does not appear to have been accepted by any of the Judges, the Lord Chief Justice declaring that it was the birthright of the subject to petition

The Judges pointed out to the jury that the two questions for their consideration were.—1. Was the publication proved?—a mere question of fact upon which there could be no doubt. 2. Was the petition libellous? *Wright*, L.C.J., and

¹ Noy, 100, 2 Cro Jac. 37

Allybone, J., expressed their opinions that it was; *Holloway* and *Powell*, JJ, thought that it was not.

The jury having retired and been locked up all night, the next morning delivered a verdict of *Not Guilty*.

Notes—This trial illustrates several questions of great constitutional importance 1 The document presented to the King might be argued to be privileged on the ground of its being a *petition*, and this raises the question of the limitation to the right of petition ¹ 2 The Crown charged the petitioners with sedition, and thence starts an inquiry into the nature of a seditious libel ² 3 This alleged seditious character again arises out of the denial of the dispensing power, and the principal argument both of the bar and the bench turned upon the great question of this prerogative] The last point will be found discussed in a Note; to enter upon the others would carry us too far.

Points of law at the trial—But upon the trial there were several minor points of law raised by the bishops' counsel which it may be useful to summarise ³

1 It was argued that they should not be compelled to plead, because the return made by the Lieutenant of the Tower to the writ of Habeas Corpus, upon which the bishops had been brought up for trial, did not state that they had been committed by the Privy Council as such, but by certain "lords of the Privy Council."

The objection was bad, since the warrant, the really important document, was sufficient in point of form.

2 Nor as lords of Parliament had they been legally committed, since "seditious libel" was not a breach of the peace, for which sureties may be demanded But privilege of Parliament holds except in the cases of "treason, felony, and the peace" ⁴ (i.e., breach of the peace), and this privilege secures those entitled to it against commitment

Both these points were overruled by three Judges *Powell*, J., in each case would like to wait to consider precedents, and would give no opinion.

3 Strong objections were taken as to the nature of the proof of handwriting offered—but these only show how unsettled was the law upon the subject of proof of handwriting As to some, though not as

¹ On the history of the right to petition, see 1 May, Const Hist Eng 444—451; Cox, Inst Engl Gov 260—265

² On the controversies as to a seditious libel, Cox, Inst Engl. Gov. 278-293; 2 May, C H E. 107—117, and *passim*

³ They will be found stated at greater length and discussed in 2 Phill S T. 333—355

⁴ Coke, 4th Inst. 25.

to all of the bishops, evidence was offered which would now be considered quite satisfactory in *kind*—of witnesses who had seen them write, or received letters from them, and so could testify as to the identity of handwriting, and so on. The Judges being divided as to the sufficiency of the proof, other evidence was required, and therefore Blathwayt was produced.

4 The last objection was that there was no evidence of publication in Middlesex. To this the Court agreed, and were about to direct the jury to acquit on this ground, but at the last moment Lord Sunderland was produced to prove the actual delivery of the document into the King's hands.

Hollouay and *Pouell*, JJ, who expressed opinions in favour of the defendants, were deprived of their offices shortly afterwards. At the Revolution, which soon followed, five out of the seven bishops refused to take the oath of allegiance to William III, and were deprived of their sees.

NOTE I.—THE DISPENSING POWER.

✓ The existence of a suspending and dispensing power as a prerogative of the Crown is one of the questions which have most engaged the partisanship of historical and constitutional writers, and its true history has been consequently much debated. Writers like Lord Campbell and Lord Macaulay deny that it ever existed; but Hallam cautiously observes that "it was by no means evident that the decision in *Sir Edward Hales' Case* was against law."¹ An argument for its existence will be found to have been urged in a law court so recently as 1815.²

✓ It is certain that the power in our earlier history was often employed; and not unfrequently with the approval of the people. It seemed indeed almost a corollary from the King's power of pardon; if he might dispense with the penal consequences of an offence when it had been committed, it seemed natural that he should be able to supersede the necessity of pardon by a previous licence to commit the action.

It is said to have been first used by Henry III in imitation of the power of dispensation claimed by the Pope, to all of whose rights the Crown claimed to succeed. It is true that even then protest appears to have been made against the introduction into the civil Courts of the old ecclesiastical "*non obstante*" clause.³ Nevertheless instances of dispensation became numerous, and parliaments of Richard II permit the King to exercise the power, while reserving a right to disagree thereto; and this power is amply recognised by the Commons in the reign of Henry IV.

In the reign of Henry VII it was determined by all the Judges in the Exchequer Chamber that although an Act of Parliament forbade any person to hold the office of sheriff for more than a year, and expressly barred the operation of a *non obstante* clause, nevertheless a grant of a shrievalty for life, if it contains such a clause, would be valid. And this case was not only approved by Fitzherbert, by Plowden, by Coke, and by all the Judges in *Calvin's Case*, but it was followed in *Thomas v Sorrell*.

¹ 3 Const Hist 62.

² By Dr Lushington in the *Case of Eton College* (1815); see Anson, Law and Custom of the Constitution, 1, 351.

³ I.e., "notwithstanding any law to the contrary."

On the other hand the protests frequently made against its exercise were made rather against particular occasions of its use. When Charles II, wishing to employ the suspending power, issued his Declarations of Indulgence, Parliament protested, and he was obliged to withdraw them. Of this much is made in the argument of the Seven Bishops, and Macaulay considers it a complete abandonment of the right. But no protest was made on his suspending other statutes, as for example the Navigation Act.

We may fairly sum up perhaps by saying that the power had been frequently exercised, though always subject to protest when its particular exercise was disapproved. But its legality, at any rate so far as it was exercised in respect of acts which were only *mala prohibita* and not *mala in se*, was fully admitted by the courts, and there was nothing in the concessions made, for example, by Charles II, to amount to an express renunciation or statutory abolition of the claim. It was the determination of James II to employ the power as a means of giving relief to Roman Catholics which led to a new settlement of the kingdom, and the formal abolition of a prerogative of which the people had become impatient; for questions as to the dispensing and suspending power and the right to petition were finally set at rest by the Bill of Rights (1 Wm. and Mary, sess 2, c 2), by which it was amongst other things declared “(1) That the pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of Parliament is illegal; (2) that the pretended power of dispensing with laws, or the execution of laws, by regal authority, as it hath been assumed and exercised of late is illegal, (5) that it is the right of the subjects to petition the King, and all commitments and prosecutions for such petitioning are illegal.” It was also enacted by section 12 “That no dispensation by *non obstante* of or to any statute, or any part thereof, shall be allowed, but that the same shall be held void and of no effect, except a dispensation be allowed of in such statute.”

The words in this statute “as it hath been assumed and exercised of late” should be noticed, as by them the ancient prerogative of the King to dispense with the punishment of an offender *after conviction*, or in other words to pardon, was saved.

The royal prerogative of pardon is a manifestation of the power which is the subject of this Note. It is now exercisable by the Home Secretary, subject to the following rules —

1. It relates only to offences of a public character (in which the sanction is remissible by the sovereign only, if remissible at all)

2. It must not be anticipatory. Hence, by the Act of Settlement

of 1700, s 3, no pardon under the great seal is pleadable in bar of an impeachment

3 It can only relieve from a penalty

4 It cannot deprive any injured party of any rights of private suit

The Criminal Appeal Act (7 Edw 7, c 23), has not modified the prerogative, save in that the Court of Criminal Appeal, when a matter has been referred to it by the Home Secretary, has power to set aside a conviction. This would appear to be a statutory addition to the common law prerogative ¹

¹ On the subject generally see Chalmers and Asquith, *Outlines of Constitutional Law*, pp 17—20

THE RIGHT TO IMPOSE.

Bate's Case (The Case of Impositions).*Lane, 22; 2 St. Tr. 371. (1606).*

Case.] An information was exhibited in the Exchequer against John Bate, a Levant merchant, for refusing to pay an impost or customs duty of 5s per cwt on currants, ordered by letters patent from the King over and above the statutory poundage of 2s 6d per cwt. Upon this statute defendant relied, and opposed payment of the 5s as illegally imposed. The King's attorney demurred to these pleas.

Judgment of the four barons was unanimous *for the Crown*, on grounds of which the following is an abstract:—

1 The King's power is twofold—ordinary and absolute. The ordinary power, or common law, which exists for the execution of civil justice, cannot be changed without Parliament. But the King's absolute power affecting matters of State and the general benefits of the people is *salus populi*, and is not directed by the rules of common law, but varies according to the wisdom of the King. Customs are a material matter of State. Judgment in matters of prerogative must be not according to common law, but according to Exchequer precedents. They referred to cases in which the Crown had levied customs over and above subsidies granted by Parliament; *e g*, to an increased custom on foreign merchandise levied by Edward I; to a custom levied by Henry VIII, and to a similar impost in the reign of Mary.

2 All customs are the effect of foreign commerce; but all commerce and foreign affairs are in the absolute power of the King. The sea-ports are the King's gates, which he may

open or shut to whom he pleases, and he has therein absolute power. He provides fortresses for their safety.

3. If he may prohibit the importation of goods, he may *a fortiori* tax them and impose the tax by way of reprisal.

4. If he may impose, he may impose what he pleases.

Petition of Grievances.—While the case was pending the matter had already been taken up by the Commons, who upon presenting a petition were informed by the King of the decision of the Courts in his favour. In July, 1608, a Book of Rates was published under the authority of the great seal, imposing heavy duties upon almost all mercantile commodities, to be paid to the King, his heirs and successors. When Parliament again met in 1610 they debated the whole question, and were not deterred by the King's message that they were not to do so. The debate lasted four days, the principal speakers being Sir Francis Bacon and Yelverton¹ for the right of imposition, and Hakewill and Whitelocke on the other side.

Argument against the right.—The main points in the argument against the King's right to impose were:

I. Customs are *consuetudines*, and the very name shows that this "duty is a child of the common law."²

II. But by the common law the duty is a thing certain, not to be enhanced by the King without consent of Parliament. Where the common law has made provision, the King may not impose arbitrarily.

All our kings, from Henry III, have sought increase of customs by way of subsidy from Parliament; sometimes by

¹ In the State Trials (ii, 477), Yelverton is said to have spoken against the right, and Whitelocke's speech is erroneously attributed to him. Notes and Queries, 3 Ser ix, 382, x, 39, 111.

² There were, of course, certain dues and customs payable to the King at common law or by a very ancient prescription, as, *e.g.*, the feudal reliefs and aids, "prisage," which was a duty payable to the King upon every shipload of wine imported by English merchants, and a customs duty on wool.

way of prayer and entreaty, and for a short time; sometimes even by way of loan, undertaking to repay. All which is an argument that they had no such absolute power. Even Edward III, than whom "there was not a stouter, a wiser, a more noble and courageous prince," prayed his subjects for a relief for the maintenance of a war (14 Edw 3, stat. 1, c. 21). When merchants alone granted a subsidy on wool, the Commons complained, 27 [*it should be* 17] Edw. 3, and in stat 36 Edw. 3, c. 11, it is expressly forbidden.

From the Conquest till the reign of Mary—480 years—there were only *sex* impositions by *twenty-two* kings; and yet all these, even when borne for a short time, were complained of, and upon complaint removed. Other so-called impositions were "dispensations or licences for money, to pass with merchandise prohibited by act of parliament to be exported."

III. Even if the King had such power at common law, it is utterly abrogated by statutes, the chief being:—Magna Carta, c. 30; 25 Edw. 1, c. 7; De Tallagio non concedendo³ (cited as 34 Edw. 1, st. 4); 14 Edw. 3, st. 1, c. 21.

These debates resulted in a *Petition of Grievances*⁴ to the King, 1610; which not only complained of impositions in general, but also sought relief in respect of certain imposts on alehouses and sea coal: and begged "that all impositions got without consent of parliament may be quite abolished and taken away." A bill was introduced with this object, but dropped in the House of Lords. The impositions on sea coal and alehouses were remitted, but no further concession was made. A bill was again introduced in the Parliament of 1614, but the Lords declined a conference upon the subject,

³ The De Tallagio non concedendo, though recited as a statute even in the *Petition of Right*, and held to be so by the Judges in 1637, seems to have been, as suggested by Dr Stubbs, a mere abstract of Edward's confirmation of the Charters. *Select Charters*, 487.

⁴ Printed more fully than in the *St Tr in Petyt, Jus Parliamentarium*, 318.

and the Parliament was dissolved without anything having been done.

Note—The decision in this case was considered by Coke and Popham to have been correct (see 12 Rep 33); and it was treated by the Judges in 1629 as conclusively established. For a full discussion of the whole controversy, see 2 Gardiner, *Hist. Engl.*, 1-12, 70, 75-87, 236-48. It is impossible here to give anything like a full account of the prior history of the imposition on currants, which formed the subject-matter of this case. It may, however, be stated that the duty had in one form or another existed from about the year 1580. It had originally been imposed at the request of the merchants themselves, and mainly for protective reasons. Similar duties had been imposed during the two preceding reigns, and no question as to their legality had been raised for nearly half a century.

The judgment of the Court of Exchequer has no doubt been condemned by most modern historians. Mr. Hubert Hall, of the Public Record Office, however, after a careful examination of the original records, many of which he finds to have been mis-stated and mis-quoted by those members of the House of Commons who spoke against the imposition, alleges in his "*History of the Customs Revenue in England*" (Elliot Stock, 1892), that there is far more to be said in support of the judgment of the Court than has commonly been supposed, that it was in fact wholly warranted by the then existing state of the Constitution. It is unfortunate that the judgment of Chief Baron Fleming, an admittedly able and upright Judge, has only come down to us in a mutilated form in the *State Trials*. Sir Wm. Anson (*Law and Custom of Constitution*, 1, p. 559) expresses an opinion that the decision in *Bate's Case* violated the spirit of the Constitution rather than the letter of the law.

The question was in the end settled by legislation, at first by the Statute 16 Car. 1, c. 8, and still more definitely by the Bill of Rights (1 Wm. and Mary, sess. 2, c. 2), by which it was declared "that levying money for or to the use of the crown by pretence of prerogative without grant of parliament for longer time or in other manner than the same is or shall be granted is illegal."

R. v. Hampden (The Case of Ship Money).

3 *St. Tr.* 825; 2 *Rushworth*, 257. (1637).

Case.] Charles issued writs for the collection of ship money to the city of London, and other maritime towns, in 1634. In 1635 he issued writs demanding composition in money, even from inland counties. Upon these writs he took the opinion of the Judges, and was advised by ten out of the twelve that when the good and safety of the kingdom in general was concerned, and the whole kingdom was in danger—of which he was to be considered the sole judge—he might by writ under the great seal command all the subjects at their charge to provide such number of ships with men and munitions as the King might think fit for the defence of the kingdom, and might compel obedience to such writs. The King thereupon proceeded to issue writs to the various sheriffs commanding them to provide the ships and men mentioned in the writs, and to assess the expenses upon the inhabitants of their counties, and to imprison any who might be refractory. Similar writs were issued in 1636. On Hampden's refusing to pay £1, the amount at which he was assessed, proceedings were taken against him in the Exchequer.

He demurred, and the demurrer was heard in the Court of Exchequer Chamber.

St. John and *Holborne* appeared for Hampden.

It is conceded (1) that the law of England provides for foreign defence; and (2) lays the burthen upon all; (3) that it has made the King sole judge of dangers from abroad, and when and how the same are to be prevented; and (4) that it has given him power by writ to command the inhabitants of each county to provide shipping for the defence of the kingdom.

The question is only *de modo*. This must be by the forms and rules of law. As without the assistance of his Judges the

King applies not his laws, so without the assistance of Parliament he cannot impose

The law has provided for the defence of the realm both at land and sea by undoubted means: (1) by tenure of land giving service in kind and supply; (2) by prerogatives of the Crown; (3) by supplies of money for the defence of the sea in times of danger. These are the ordinary settled and known ways appointed by the law. But the King may not run to extraordinary, when ordinary means will serve. The King may call Parliaments when he chooses.

That Parliament is the means of supply appointed for extraordinary occasions is shown both by reason and authority.

A series of statutes were quoted showing the same thing:—*Charter of Will.* 1; *Magna Carta*; 25 *Edw.* 1, c. 5; *De Tallagio non concedendo*¹; 14 *Edw.* 3, st. 2, c. 1; 25 *Edw.* 3; 3 *Car.* 1, c. 1, s. 10.

So much as to defence in general. That of the sea has nothing special. Most or all of the precedents are the charging sea-towns which are discharged of defence at land. The charge is therefore double in the one case and single in the other. Any towns not maritime ought not to be charged, which is the very case of the defendant.

Holborne, would not admit that the King was the proper judge of danger, except when the danger was so imminent that Parliament could not be consulted.

Lyttelton, S.-G., and *Bankes*, A.-G., appeared for the Crown.

Judgment.—*Weston*, *Crawley*, *Berkley*, *Vernon* and *Trevor*, delivered judgment for the King; *Croke*, *Hutton* and *Denham* for the defendant; *Bramston*, C.J., and *Davenport* also for the defendant, but mainly on technical grounds; *Jones* and *Finch*, C.J., for the King.

Croke reiterated, and added somewhat to *St John's* arguments

¹ See note, p. 19

The Judgment of *Finch*, C J.,² may be thus summarised :

The defence of the kingdom must be at the charge of the whole kingdom. The sole interest and property of the sea, by our laws and policy, is in the King, and sea and land make but one kingdom, and therefore the subject is bound to the defence of both. Parliament is not the only means of defending the kingdom. The King is not bound to call it but when he pleases, and there was a King before a Parliament. The law which has given the interest and sovereignty of defending and governing the kingdom to the King, also gives him power to charge his subjects for its defence, and they are bound to obey. The precedents show that though for ordinary defence they go to maritime counties only, when the danger is general they go to inland counties also. Acts of Parliament to take away the royal power in the defence of his kingdom are void. "They are void acts of parliament to bind the king not to command the subjects, their persons and their goods, and I say their money too, for no acts of parliament make any difference."

Seven of the Judges deciding against the defendant, judgment was for the Crown.

¹ *Note*—This case brought to a head the claim of the Crown to enforce direct taxation just as in *Bate's Case* the question of the right to impose indirect taxation was raised. Whatever may be thought of the judgment in *Bate's Case*, and we have already indicated that much could be said in its favour, it seems quite impossible to justify the judgment of the majority of the Court in the case of ship money. Apart from questions as to earlier statutes and precedents the claim of the Crown was absolutely barred by the then recent statute, 3 Car 1, c 1 (the Petition of Right), which provided "that no man hereafter be compelled to make or yield any gift, loan, benevolence, *tax*, or such like charge, without common consent by Act of Parliament".²

Nevertheless, similar writs were issued for the fourth and last time in 1639, but in the following year Sir Robert Berkeley and other of

² Lord Clarendon observes "Undoubtedly my lord Finch's speech in the Exchequer Chamber made ship money much more abhorred and formidable than all the commitments by the Council table, and all the distresses taken by the sheriffs in England."

the Judges were impeached, and the following resolution of the House of Lords passed "That the ship writs, the extra-judicial opinions of the Judges both first and last and the judgment in Mr Hampden's case and the proceedings thereupon in the Exchequer Chamber are all illegal and contrary to the laws and statutes of this realm, contrary to former judgments and contrary to the Petition of Right". The judgment itself was declared void by the Long Parliament in 1641 (16 Car 1, c 14). And by 16 Car 1, c 8, the levy of tonnage and poundage was also declared illegal.

Bowles v. Bank of England.

[1913] 1 Ch. 57; 82 L. J. Ch. 124.

Case.] On May 31, 1912, the plaintiff, Thomas Gibson Bowles, purchased £65,000 Irish Land Stock, which was transferred into his name in the books of the Bank. On this stock the dividends were payable half-yearly, on January 1 and July 1. On April 2, 1912, the House of Commons passed a resolution approving of the imposition of income tax at the rate of 1s. 2d in the pound, for the financial year commencing April 6, 1912. The Finance Act embodying the resolution did not receive the Royal Assent till August 2. In the meantime, on June 26, the plaintiff issued his writ claiming an injunction to restrain the defendants from deducting the tax and a declaration that they were not entitled to do so. He subsequently amended the writ and claimed £52 10s. 8d, the amount of income tax deducted.

Judgment.—Does a resolution of the Committee of Ways and Means, asked *Parker, J.*, either alone or when adopted by the House authorise the Crown to levy on the subject an income tax assented to but not yet imposed by Act of Parliament? This can only be answered in the negative. The Bill of Rights finally settled that there could be no taxation in this country except under the authority of an Act of Parliament. This remains unrepealed, and no practice, however long

acquiesced in, can be relied on by the Crown as justifying any infringement of its provisions.

The original temporary character of the income tax led to the Act being so framed as to expire, save as to arrears, at the end of the period for which it was imposed *i.e.*, on April 5 in each year. This system led to an inconvenience, as the powers of the collectors remained in abeyance, so that necessary preliminary work could not be done. A statute (Customs and Inland Revenue Act, 1890, s. 30), made provision for this and kept the machinery clauses alive. If the assessment and collection of tax under the section is authorised before the Finance Act of the year, the following difficulties occur.—

(1.) It is not possible to assess the amount of the tax when the rate has not been fixed.

(2.) A resolution when reported to the House might not be accepted

(3.) The resolution might be accepted, but the tax might be imposed at a greater or less rate

(4.) If the Legislature had intended, *non obstante* the Bill of Rights, to enable the Crown to collect taxes on the authority of the Committee of Ways and Means, it would have expressly so provided.

The authority of section 30 of the Act of 1890 was invoked to cover the assessment and collection. To admit this would be to make it a permanent tax. Such construction is impossible; for

(1.) The subject would remain too long in doubt as to his rights

(2.) How could the subject recover the amount of a tax provisionally levied in excess?

The proper interpretation of the section is . . . that it does not authorise the assessment and collection of a tax not yet imposed by Parliament. The words of the statute confirm this construction. Its object was stated to be the collection “in due time.” A tax levied before the Act imposing it is

passed, is not collected in due time within the meaning of the Act.

This view was also confirmed by section 1 of the Income Tax Assessment Act, 1876.

With regard to the practice of the Bank of England in making deductions, Parliament has taken cognisance of this in the Finance Act, 1894. It was done in several subsequent years, and finally in section 14 of the Revenue Act, 1911, there are permanent provisions. It contemplates the case of dividends having been paid without deduction before the passing of the Income Tax Act, and provides what is to be done in that event. If this section recognises anything, it is the legality of the payment of dividend without deduction for a tax not yet imposed.

The learned Judge declared that the defendants were not entitled to make the deduction, and made an order for the payment out of Court of the amount claimed, and for the payment of the plaintiff's costs by the defendants.

Note—The income tax is levied for one year only, and expires on April 5 in the following year. It can only be reimposed by a new Act. Without such legislative sanction it was levied from April 6, 1909, till April 29, 1909, at which latter date the Finance Bill for the year 1909-1910 received the royal assent and became an Act.

Similarly, on April 6, 1910, there was no Act imposing income tax for the year 1910-1911. The tax was nevertheless levied from that date till November 28, 1911, when the Finance Bill of the year received the royal assent. Again, in the year 1911-1912, income tax was unlawfully levied till December 16, 1911. In the year 1912-1913 the period of unlawful imposition was from April 6, 1912, till August 6 in 1912.

It is estimated by Mr. Gibson Bowles that a sum of £12,000,000 was exacted without lawful authority during that period.

The decision in the above case brought about a change in the law. The levy of this tax is conducted by the Commissioners of Inland Revenue, who act under the direction of the Treasury. Certain duties in connection with deduction devolve on the Bank of England, viz., as regards the deduction in those cases where it is deducted at the source. The statute 3 Geo. 5, c. 3, authorises the collection or deduction

of the tax for a period of four months only, *ie*, till August 6 in the fiscal year. This renders it necessary that the Finance Bill shall pass within four months if a breach of the law is to be avoided. The Act applies to customs and excise and income tax.

By section 1, sub-section 1 of the Parliament Act, 1911 (1 & 2 Geo. 5, c. 13), a Money Bill must be sent to the House of Lords not later than one month before the end of the session. If, being so sent, it is not passed by the Lords within a month, it becomes law on receiving the royal assent without the co-operation of the Lords. The Act provides a special enacting clause for use in cases within its sections. Sub-section 3 provides that a Money Bill shall be endorsed as such by the Speaker of the House of Commons.

Att-Gen. v. Wilts United Dairies, Ltd.

90 *L. J. K. B.* 562; 91 *L. J. K. B.* 897; (1921), 37 *T. L. R.* 884; (1922), 38 *T. L. R.* 781.

Case.] In this case the Attorney-General sought to recover from the defendants the sum of £15,027 4s. 6d., being the amount of 2d. a gallon which they had agreed to pay on milk purchased by them under licence from the Food Controller. The latter had granted the licence under the Milk (Registration of Dealers) Order, 1918, and the Milk (Distribution) Order, 1918, made in virtue of the Defence of the Realm Act.

Judgment.—It was held by the Court of Appeal that the imposition of 2d. a gallon was a levying of money for the use of the Crown without grant of Parliament within the meaning of the Bill of Rights. The imposition as a condition of the grant of a licence was not within the statutory powers of the Food Controller and was consequently illegal. The fact that it was expressed in the form of an agreement made it no less so. Upon appeal to the House of Lords, Lord *Buckmaster* said the appeal raised a question of great importance. “The Attorney-General had laid great stress upon the difficulties arising from the war and upon the enormous importance of having officials free to act immediately under their powers without having their actions perpetually challenged, but that

could not give to an official the right to act outside the law, nor could the law be unduly strained to allow him to do what it might be thought reasonable that he should do. In times of war Parliament should be, and generally was, in continuous session, and if the powers of an official were thought to be inadequate, further powers could be readily obtained from the Houses of Parliament. The only question was: Were those powers granted? There were only two possible sources from which the Food Controller could derive his powers. One was the words of the Act of Parliament by which he was appointed, the other the Defence of the Realm Act. Neither of these enactments enabled the Food Controller to levy any sum of money on any of His Majesty's subjects. Drastic powers were given to him in regard to the regulation and control of the food supply, but they did not include the power to levy money, which he must receive as part of the national funds. However the character of the transaction might be defined, in the end it remained that people were called upon to pay money to the Controller for the exercise of certain privileges. That imposition could only be properly described as a tax, which could not be levied except by direct statutory means. The appeal failed."

Note—This decision was followed in *T. & J. Brocklebank, Ltd v The King* (1924), 94 L. J. K. B. 26; 40 T L R 237. In this case, the Ship Controller declined to grant a licence for the sale of a ship unless the suppliants paid 15 per cent of the purchase price to the Ministry of Shipping. The imposition of this condition was held to be *ultra vires* and a levying of money for the use of the Crown without a grant of Parliament within the meaning of the Bill of Rights ¹

¹ On taxation generally, see Chalmeis and Asquith, *Outlines of Constitutional Law*, p. 315—321.

PARLIAMENT—PRIVILEGE.

Ashby v. White and others.

2 *Lord Raymond*, 938; 3 *ibid.* 320; 14 *St. Tr.* 695—888;

1 *Smith*, *L. C.* 240. (1704.)

Case.] The plaintiff being duly qualified, had tendered his vote in an election of burgesses for Parliament, and this had been refused by the defendants as returning officers. Although the candidates for whom he would have voted were duly elected, the plaintiff brought an action, and laid the damages at £200. He obtained a verdict, with £5 damages and costs.

On motion in the Queen's Bench in arrest of judgment, on the ground that the action did not lie, judgment was given for the defendants, *Holt*, C J., dissenting. Upon writ of error in the House of Lords this was reversed on the grounds set forth by *Holt* in the Court below.

Judgment—The franchise is a right of a high nature. "If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy, for want of right and want of remedy are reciprocal." An injury (*i e*, an invasion of a man's legal right) imports a damage, even if no pecuniary damage is shown. The right to vote is founded upon the elector's freehold, and matters of freehold are determinable in the King's Courts. This is a proper tribunal to try the question, "who has a right to be in the parliament is properly cognizable there, but who hath a right to chuse is a matter settled before there is a parliament." And again the House of Commons cannot take cognisance of particular

men's complaints, nor can it give satisfaction in damages, nor was such a petition ever heard of in Parliament as that a man was hindered of giving his vote and praying for a remedy Parliament would undoubtedly say "take your remedy at law." It is not like the case of determining the right of election between the candidates.

Held.—That an action will lie against a returning officer for refusing the vote of a duly qualified person: and that the refusal is an injury, though it be without any special damage.

The House of Lords gave judgment in Ashby's favour on January 14, 1704. The Commons immediately took the matter up, and after debates lasting from January 17 to 25, on this latter day they passed resolutions that neither the qualification of any elector, nor the right of any person elected is cognisable or determinable elsewhere than before the Commons of England in Parliament assembled, except in such cases as are specially provided for by Act of Parliament; and that an action in any other Court was therefore a breach of privilege. The Lords also discussed the question, and passed counter-resolutions.

Meanwhile five other "Aylesbury men" had brought similar actions against the constables of their borough. They were thereupon committed to prison (December 5) by the House of Commons for a breach of their privileges, together with their counsel and attorneys who had attempted unsuccessfully to obtain their discharge on *habeas corpus*, the majority of the Judges holding, against *Holt*, C.J., that the House of Commons were the sole judges of their own privileges. The burgesses then applied for a writ of error to take the question to the House of Lords. Nevertheless the House of Commons resolved that no writ of error lay in this case, and petitioned the Queen not to grant it. The Lords also appealed to the Queen by an address, in which they showed that writs of error

from inferior tribunals were *ex debito justitiæ*, writs of right, and upon the Queen's referring the question to the Judges, ten out of twelve certified to that effect. They further complained that the resolutions of the House of Commons amounted to a direct repeal of the laws protecting the liberty of the subject by means of *habeas corpus*, and prayed that she would order the writs to issue. The reply of the Queen was, that she would have granted the writs of error prayed for, but that it was necessary at once to put an end to the session, and she knew, therefore, that no further proceedings could be taken.

The prorogation of Parliament set the Aylesbury men and their legal advisers at liberty and left them free to pursue their legal remedies, without the intervention of privilege, and they obtained verdicts and execution against the returning officer.

^{*} *Note*.—Apart from the discussion of the privileges of Parliament which arose out of this case, it is probably of greater importance as illustrating the maxim "*ubi jus ibi remedium*," and the principle that the mere novelty of a complaint in an action on the case was in itself no answer to the action, if it were based upon an invasion of a right recognised as such by the law. In these respects *Ashby v White* will be found fully commented on in Smith's Leading Cases. The case is also of interest in connection with the duties and liabilities of a returning officer. It is observed in *Tozer v. Child* (1857),¹ that the report of this case in Raymond is defective in failing to show that Holt, C J, based his judgment on the fraud and malice of the defendant. A fuller form of the judgment was published from a manuscript in 1837, and here, indeed, this point is directly dealt with, as Holt, C J, there states that malice was charged by the plaintiff in his declaration and so found by the jury. It has indeed since been held that if a returning officer, without malice or any improper motive, but exercising his judgment honestly, refuses to receive the vote of a person entitled to vote at an election no action will lie against him as, acting in a quasi-judicial capacity, he is protected if he acts honestly (*Tozer v. Child*, *supra*). It would appear that in such a case the right of the voter as against the returning officer is not an absolute right to have his vote recorded, but, as was suggested by Bramwell, B.,

in *Tozer v Child*, a right to have the goodness of his vote fairly considered by the officer.

It will be observed that *Holt*, C J, expressly repudiated any claim on behalf of the Court to determine the question of disputed elections, as, when *Ashby v White* was tried, it was recognised that the House of Commons alone had jurisdiction to decide such disputes, and that the sheriff in making his return as to an election was responsible only to the House, *Barnardiston v Soame*, 6 St Tr 1063. From about 1600 to 1868 the House, sometimes as a whole, but latterly by a committee, disposed of all questions as to disputed elections, but by 31 & 32 Vict c 125, amended by 42 & 43 Vict c 75, the trial of election petitions and questions arising out of controverted elections were referred to two Judges of the King's Bench Division of the High Court of Justice, who certify their finding to the Speaker.

But a returning officer, in common with all servants of the Crown, is liable for criminal acts. Thus, in *Reg v Hall*,² an overseer was indicted for unlawfully, wilfully, and maliciously, knowingly and corruptly omitting from the list of voters the name of one Stanley Mockett. It was laid down that an offender against a statute for the liberty and security of the subject, or for a matter of public convenience, may be sued by the party aggrieved or be indicted for contempt of the statute.

² [1891] 1 Q B 747, 60 L J M C 124

PARLIAMENT—POWER TO COMMIT.

Case of Lord Shaftesbury.

1 *Mod.* 144; 6 *St. Tr.* 1269. (1677.)

Case.] Lord Shaftesbury, with two other Peers, had been committed to the Tower by an order of the Lords “during the pleasure of this House for high contempts committed upon this House.”

Some months afterwards Lord Shaftesbury was brought up in the King’s Bench on a writ of *habeas corpus*, and the question of the sufficiency of the return was argued.

It was admitted that there had been many instances of commitment by each House, but the question had never been determined in a Court of law.

Judgment.—The Judges declared that the return would have been held ill and uncertain in the case of an ordinary Court of Justice. But the Court was bound to respect the most High Court of Peers, and the return was not examinable in the King’s Bench. It would be otherwise if the session was over.

Held.—That the prisoner must be remanded.

In the next session this application to an inferior Court was voted a breach of privilege, and Lord Shaftesbury was called upon to beg their Lordships’ pardon for bringing his *habeas corpus*. This he did, and was discharged.

Burdett v. Abbot.

12 *R. R.* 450; 14 *East*, 1—163; 4 *Taunt.* 401;
5 *Dow*, 165. (1811.)

Case.] This was an action of trespass against the Speaker of the House of Commons for breaking into the plaintiff's house, and carrying him to the Tower.

The defendant pleaded that the plaintiff and himself were members of a Parliament then sitting, that it had been resolved by the House of Commons that a letter from the plaintiff in a newspaper was a breach of its privileges, and that the Speaker should issue his warrant for the plaintiff's commitment to the Tower in pursuance of which warrant the plaintiff had been arrested.

Judgment.—The case was first argued on demurrer before Lord *Ellenborough*, C J., and the Court of King's Bench; whose judgment was affirmed on a writ of error before Sir *Jas. Mansfield*, C J, in the Exchequer Chamber; and again affirmed in the House of Lords by Lord *Eldon*, C., and Lord *Erskine*

Held:—That the power of either House to commit for contempt is reasonable and necessary, and well established by precedents, and that the execution of a process for *contempt* justified the breaking into the plaintiff's house.

Note—The preceding case of Lord Shaftesbury shows the right of the House of Lords to commit for contempt. In *Burdett v. Abbot* it was placed beyond question that the House of Commons had a similar jurisdiction. There is said, however, to be this difference in the powers of the two Houses; the Lords may commit for a definite period which may extend beyond their own session, whereas a commitment by the House of Commons ceases, *ipso facto*, at the prorogation of Parliament.¹

It is clear that if it appears by the warrant that the commitment was for contempt, the Court will not inquire further, if, however, as Lord *Ellenborough* said in *Burdett v. Abbot*,² it did not profess to commit for contempt but for some matter appearing on the return

¹ *Anson*, 1, 189, *R v. Flower*, 8 T R 314, 4 R R 662

² 14 *East*, at p 150

which could by no reasonable intendment be considered as a contempt, but a ground of commitment evidently arbitrary and unjust and contrary to every principle of law or justice, then the Court would probably look into the return and act as justice might require

In this case are set forth two alleged bases of the right to commit for contempt of Parliament. *Bayley, J.*, seems to ascribe it to the character of the Commons as a Court of Record, while *Ellenborough, C J.*, is of opinion that it is to be sought in expediency. The latter is the less doubtful ground, and is approved by *Anson*.

Contempt of Court seems to involve two ideas, *viz.*, contempt of the power and of the authority of the Court. The first refers to the ability to enforce its orders, the latter to its jurisdiction to declare the law and the rights of the parties. According to *Viner*, every Court of Record can commit for contempt of itself.

It may be observed that it has been held in the Privy Council that the *lex et consuetudo parliamenti* do not belong to the supreme legislative assembly of a colony, and that colonial Parliaments have no right to punish by imprisonment for contempts committed within their walls. *Doyle v Falconer* (1866), L R 1 P C 328; 4 Moo P C (N S) 203, 36 L J P C 33; or beyond them, *Kielley v Carson* (1842), 4 Moo P C 63; 59 R R 336; and *Fenton v Hampton* (1858), 11 Moo P C 347, 117 R R 32. Any such authority, therefore, must rest upon statute, and has in some cases been conferred, see *Speaker of Legislative Assembly of Victoria v Glass* (1871), L R 3 P C 560; 40 L J P C 17. In Victoria the Assembly has the power to commit by virtue of a clause in its constitution statute, and the same applies in the case of the Legislative Assembly of Nova Scotia (*Fielding and Others v Thomas*, [1896] App Cas 500, 65 L J P C 103). In *Harnett v. Crick*, [1908] A C. 470; 78 L J C P 38, a resolution, under the Constitution Act, by the Legislative Assembly of New South Wales, suspending a member, passed to defend the regularity of the proceedings of the House and not by way of punishment, was upheld by the Judicial Committee. The power of expelling disorderly persons they possess of course, but this is not peculiar to them; as Lord *Abinger, C B.*, has said, "every person who administers a public duty has a right to preserve order in the place where it is administered, and to turn out any person who is found there for improper purposes" ³

Compare the case of the *Sheriff of Middlesex, infra*, p 44, and note.

³ *Jewison v. Dyson* (1842), 9 M & W. 540, at p 586; 11 L J Ex. 401

PARLIAMENT—FREEDOM OF SPEECH.

Rex v. Eliot, Holles and Valentine.

Cro. Car. 181; *3 St. Tr.* 294. (1629.)

Case.] This was an information by the Attorney-General against Sir John Eliot, Denzil Holles, and Benjamin Valentine, for seditious words spoken in the House of Commons, of which they were members, and for a tumult in the same place.

The defendants, by their plea, denied the jurisdiction of the Court, on the ground that offences done in Parliament could only be punished in Parliament, and they refused to plead any other plea

Judgment —After arguments in which the whole question of the privilege of free speech in Parliament was discussed, the defendants, relying, among other things, upon 4 Hen. 8, passed in consequence of *Strode's Case*, the Judges, *Hyde*, C.J., *Jones*, *Whitelocke*, and *Croke*, held that an offence committed in Parliament against the King or his Government, may be punished out of Parliament, and that the Court of King's Bench had jurisdiction.

The defendants' plea was overruled, and they were thereupon sentenced to pay heavy fines, and to imprisonment during the King's pleasure.]

In 1641 the Long Parliament passed a resolution that the exhibiting of this information was a breach of the privilege of Parliament.

In 1667 the Commons and the Lords passed resolutions that the judgment was illegal, and also that the Act of Parliament, commonly called *Strode's Act*, is a general law

declaratory of the ancient and necessary rights and privileges of Parliament.

The Lords further ordered that the proceedings in the King's Bench should be brought before them by a writ of error, and on April 15, 1668, it was ordered "that the said judgment shall be reversed."

Note—In 1512 Strode and others had been fined in the Stannary Court, and imprisoned in default, for having "with other of this House," introduced into Parliament certain bills which the tinnors did not like. It was enacted,¹ on his petition, that the judgment and execution should be void, and further, that all suits, etc., against him "and every other of the person or persons afore specified, that now be of this present parliament or that of any parliament hereafter shall be, for any bill, speaking, reasoning, or declaring, of any matter or matters, concerning the parliament to be communed and treated of, be utterly void and of none effect "

It seems to have been doubted, however, whether this Act was intended to be of general application or only to meet *Strode's Case*. The Speaker—*prolocutor*—spoke for the Commons in the Parliament Chamber, and he alone had the right of speech. Until the Commons were housed within the precincts of Parliament in 1547, the Speaker only claimed liberty of speech for himself. Since that year, the Speaker claimed liberty of speech not only for himself but for the House, and it became customary, at the opening of each Parliament, for the Speaker to include freedom of speech in his demand for confirmation of the "ancient and undoubted rights and privileges" of the Commons; but the claim, to its fullest extent, does not appear to have been admitted by the Crown, at any rate in practice. In answer to the usual demand of the Speaker in 1592-3, Lord Keeper Sir John Puckering, in the course of his speech, said "For libertie of speech her majestie commandeth me to tell you, that to say yea or no to Bills, God forbid that any man should be restrained or afayde to answear accordinge to his best likinge, with some short declaracion of his reason therein, and therein to have a free voyce, which is the verie libertie of the house, not as some suppose to speake there of All causes as him listeth, and to frame a forme of Relligion or a state of gouvernment as to their idle braynes shall seem meetest, she sayth no King fitt for his state will suffer such absurdities " ²

¹ 4 Hen. 8, c. 8

² Owing to summarised versions of this speech only having been published,

¹The above case of *Eliot, Holles & Valentine* was the last instance in which the privilege of freedom of speech in Parliament was questioned. By the Bill of Rights ³ it was declared "that the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any Court or place out of Parliament"¹. In an action of slander brought against Mr. A. Balfour, then Chief Secretary for Ireland, the Court, being satisfied that the only words spoken by the defendant about the plaintiff were spoken by him in Parliament, ordered all proceedings in the action to be stayed ⁴. Words spoken in Parliament itself are *absolutely* privileged, that is, the privilege is not lost, however malicious or false the words may have been. But this only applies to words there spoken, and if a member of Parliament chooses to repeat or publish a slanderous speech which he has made in Parliament, he is not absolutely protected, and damages may be recovered against him if it can be shown that he is acting maliciously or from an improper motive, or that the report of the speech published by him was not fair or accurate ⁵.

As to the general right of publication of Parliamentary proceedings, see pp 40-3, *post*

If an ordinary offence against the law, as *e.g.*, an aggravated assault, were committed by a member of Parliament within the walls of Parliament, there is no authority for saying that such an offence would not be cognisable by the ordinary Courts ⁶.

the Lord Keeper's answer has been misunderstood. For the full version from which the above extract is cited, see J. E. Neale, xxxi, *English Hist Rev* 128.

³ 1 W. & M., Sess 2, c. 2.

⁴ *Dillon v Balfour*, 20 L. R. Ir 600.

⁵ *R v. Lord Abingdon*, 1 Esp 226, 5 R. R. 733, *R v Creevey*, 1 M. & S. 273, 14 R. R. 427. See also *Wason v Walter*, *infra*, p. 166.

⁶ See *Bradlaugh v Gossett*, 12 Q. B. D., at p. 283, 53 L. J. Q. B. 209, 53 L. T. 620, 32 W. R. 552, 2 Hallam Const Hist (8th ed.), p. 6.

PARLIAMENT—FREEDOM FROM ARREST.

Goudy v. Duncombe.

17 *L. J. Ex.* 76; 74 *R. R.* 706; 1 *Exch.* 430. (1847.)

Case.] Duncombe had been taken in execution for default in payment of a debt secured by a Judge's order and had been discharged from custody. He was elected a member of Parliament on July 28, 1847. The House of Commons was dissolved on July 23, and on August 13, Parliament was prorogued to October 12. He was arrested on September 2.

Judgment.—Upon the authorities the Court found that the privilege of a member of the House from arrest during the continuance of the session extends to a period of forty days before and after a meeting of Parliament, and that the privilege whether after a prorogation or a dissolution applies to a person who was a member of the old Parliament but is not a member of the new Parliament.

Note—The period of forty days, as *Pollock*, C.B., said, had for about two centuries at least, been considered either a convenient time or the actual time to be allowed. It was no doubt derived from the provisions in chapter 14 of Magna Carta, for formal notice of at least forty days in the summons to Parliament. But the privilege did not extend to freedom from arrest for treason, felony or breach of the peace, nor from attachment for contempt of Court. In modern times members committed by the Courts for contempt have failed to obtain release by virtue of privilege. In 1831 Mr. Long Wellesley, having taken his infant daughter, a ward in Chancery, out of the jurisdiction of the Court, was committed for contempt by Lord Chancellor *Brougham*. Other cases are *Mr. Lechmere Chalton* in 1837; *Mr. Whalley* in 1874; *Mr. Gray* in 1882; and *Mr. McHugh* in 1902. But neither House has waived its right to interfere, and every case is still open to consideration upon the merits.¹

¹ See May, *Parl. Practice* (12th ed.), 116

PARLIAMENT—PUBLICATION OF PROCEEDINGS.

Stockdale *v.* Hansard.8 *L. J. Q. B.* 294; 48 *R. R.* 326; 9 *Ad. & E.* 1. (1839.)

Case.] A book published by the plaintiff had been described by two inspectors of prisons in a report to the Government as “disgusting and obscene.” This report was printed and sold by the defendants by order of the House of Commons. The plaintiff brought an action for libel, claiming £5,000 damages.

The defendants pleaded that they had printed and sold the report only in pursuance of the order of the House of Commons, that the report having been presented to and laid before the House it became part of the proceedings of the House, and that the House had resolved “that the power of publishing such of its reports, votes, and proceedings as it shall deem necessary or conducive to the public interests is an essential incident to the constitutional functions of parliament, more especially to the Commons House of Parliament as the representative portion of it.”

To which the plaintiff demurred, that the known and established laws of the land cannot be superseded or altered by any resolution of the House of Commons, nor can that House by any resolution create any new privilege inconsistent with the law.

Argument.—It was argued by the defendants, who had been directed by the House to plead to the action merely to inform the Court, that the act complained of was done in exercise of its authority, and in the legitimate use of its privileges: that the Courts of law are subordinate to the Houses of Parliament, and are therefore incompetent to decide

questions of Parliamentary privilege. But if the Court were competent to inquire into the existence of the privilege, it could be shown to have long existed.

Judgment per Lord Denman, C J :—

Parliament is supreme: but neither branch of it is supreme by itself; the House of Commons is only a component part of Parliament. The resolution of any one of the three legislative estates cannot alter the law or place any one beyond its control. The claim for an arbitrary power to authorise the commission of any act whatever is abhorrent to the first principles of the Constitution. The privilege of each House may be the privilege of the whole Parliament, but it does not follow that the opinion of its privileges held by either House is correct or binding. There are many cases where the Law Courts have discussed questions of Parliamentary privilege.

Nor has it been shown that the privilege of publication exists. Here the publication of the opinions referred to was not in relation to any matter before the House, and more copies were ordered to be printed than were necessary for the use of its members.

Littledale, Patteson and Coleridge, JJ, concurred.

Held:—That the House of Commons, by ordering a report to be printed, could not legalise the publication of libellous matter, and there must be judgment for the plaintiff.

Note.—In consequence of these proceedings, an Act, 3 & 4 Vict c 9, was passed, in virtue of which any person called upon to defend an action in respect of the publication of any reports, papers, votes, or proceedings of either House of Parliament ordered by either House, may bring before any Court of law in which such proceeding has been commenced, a certificate from the Lord Chancellor, or the Clerk of the Parliaments, or the Speaker of the House of Commons, or the clerk of the same House, that the publication was under the authority of the House of Lords or the House of Commons, and such Court or Judge shall thereupon stay all such proceedings. And this is to apply also to all extracts from any paper thus printed, published *bona fide*, and without malice. This Act of course settled the question, not in itself of the greatest importance, which had given rise to this memorable case.

But far greater issues were involved, and upon those issues *Stockdale v Hansard* remains, and it is to be hoped ever will remain, a binding authority. It was of this case that *Cockburn, C J.*, in his judgment in *Wason v Walter*, spoke as follows —“From the doctrines involved in this defence, namely that the House of Commons could by their order authorise the violation of private rights, and, by declaring the power thus exercised to be matter of privilege, preclude a Court of law from inquiring into the existence of the privilege—doctrines which would have placed the rights and liberties of the subject at the mercy of a single branch of the Legislature—Lord Denman and his colleagues, in a series of masterly judgments which will secure to the Judges who pronounced them admiration and reverence so long as the law of England and a regard for the rights and liberties of the subject shall endure, vindicated at once the majesty of the law and the rights which it is the purpose of the law to uphold. To the decision of this Court in that memorable case we give our unhesitating and unqualified adhesion.”

Whilst the publication of all reports, votes and proceedings published by order of either House of Parliament is absolutely privileged, in case of the publication of extracts or abstracts the privilege is qualified. It was held in *Mangena v Wright*, [1909] 2 K B 958, 78 L J K B 879, that a person who *bona fide* and without malice prints or publishes an extract from or an abstract of a Parliamentary paper, though in so doing he does not act by or under the authority of Parliament, is protected by section 3 of the Act of 1840. And where an allegation is made against a person in a privileged document, *e.g.*, in a Parliamentary paper, a comment on that allegation by a person who is not the person making the allegation may be fair comment, even though the allegation be untrue. A communication by a public servant of a matter within his province concerning the conduct of a person who is for the time being taking a public part, the matter being one of public interest, as to which the public are entitled to information, may be a privileged communication on the part of that public servant, and if sent by him to a newspaper and published therein, it may also be the subject of privilege in the proprietor of the newspaper, as that is the ordinary channel by means of which the communication can be made public. Wright was the printer and publisher of the *Times*.

A headline which is not part of the report is not privileged. As *Vaughan-Williams, L J.*, said in *Mangena v. Edward Lloyd, Ltd.* (1908), 99 L. T. 824. “There was no pretence for saying that the statutory protection applied to a headline.” Here the headline to the report was “Petition to the King—Natal Agent-General Denounces

Mangena” The jury found that the matters complained of were libellous, that the defendants published *bona fide* and without malice, and that the statements in the report as published by the defendants were not true, and gave £100 damages. *Darling, J*, gave judgment for the defendants on the ground that they were protected by section 3 of the Act. On appeal, it was held by the Court of Appeal that the finding of the jury was a general finding, which included the headline, and judgment must be entered for the plaintiff.

PARLIAMENT—CONTROL OVER ITS OWN PROCEEDINGS.

Sheriff of Middlesex's Case.

11 *Ad. & E.* 278. (1840.)

Case.] This case arose out of *Stockdale v. Hansard*. The Sheriff of Middlesex, in pursuance of a writ from the Queen's Bench, had levied execution upon property of the Messrs. Hansard. The House of Commons thereupon committed him for contempt. A writ of *habeas corpus* having been obtained the Sergeant-at-Arms of the House of Commons made a return that he had detained the Sheriff under a warrant of commitment directed to him by the Speaker, and he set forth the warrant. That document stated that the House had resolved that the Sheriff, having been guilty of a contempt and breach of the privileges of this House, be committed to the custody of the Serjeant-at-Arms; but it did not set forth what the contempt was. Upon motion to discharge the Sheriff on *habeas corpus*, Lord Denman, C J., delivered judgment.

Judgment.—The judgment in *Stockdale v. Hansard* was correct. The technical objections taken to this warrant from the Speaker are insufficient. On a motion for a *habeas corpus* the return, if it discloses a sufficient answer, puts an end to the case: and I think the production of a good warrant is a sufficient answer. With regard to the objection that the warrant did not set forth the facts which constituted the alleged contempt, no doubt words containing this kind of statement have appeared in most of the former cases but not in all. The House has power to commit for contempt, and we must suppose that it adjudicated with sufficient reason. The Sheriff must therefore remain in custody.

Held —That a Court of law cannot inquire into the grounds of a commitment for contempt by the House of Commons because the warrant of commitment does not specify the grounds upon which the person committed had been adjudged guilty of contempt.

Note —Compare the earlier cases of *Burdett v. Abbot* (1811), (*supra*, p. 34), and *R. v. John Cam Hobhouse* (1820), 2 Chitty 207. In the latter case the Court said "The House of Commons have adjudged (as appears by the warrant) that the gentleman on the floor has been guilty of a contempt in having published a seditious libel, of which he has acknowledged himself to be the author. We cannot inquire into the form of the commitment, even supposing it is open to objection on the ground of informality."

Howard v. Gossett, 10 Q. B. 359, 16 L. J. Q. B. 345, which shortly followed, was a somewhat similar case. The Court of Exchequer Chamber there held that the House of Commons has power to institute inquiries and to order the attendance of witnesses, and in case of disobedience to bring such witnesses in custody to the bar; that if there be a charge of contempt and breach of privilege and an order to the person charged to attend to answer it, and a wilful disobedience to that order, the House has power to take him into custody, and that the House alone is the proper judge when these powers are to be exercised; also that the House of Commons being a part of the High Court of Parliament, the supreme Court of this country, no mere objections of form can be taken to its warrants, as can be done in the case of warrants of justices, but that wherever the contrary does not plainly and expressly appear by the warrant itself it is to be presumed that the House has acted within its jurisdiction.

Bradlaugh v. Gossett.

12 Q. B. D. 271; 53 L. J. Q. B. 209; 53 L. T. 620. (1884.)

[Case.] This was an action against the Serjeant-at-Arms, who had been directed by the House of Commons to remove the plaintiff from the House until he should engage not further to disturb the proceedings. The plaintiff asked to have that order declared to be void as beyond the power and jurisdiction

of the House to make, and an order restraining the defendant from preventing the plaintiff from entering the House and taking the oath as a member.

The defendant demurred, on the ground that the statement of claim disclosed no cause upon which an action could be maintained, and the demurrer was argued before *Coleridge*, C J, *Mathew* and *Stephen*, JJ., who allowed the demurrer.

Held —That the House of Commons is not subject to the control of the Law Courts in matters relating to its own internal procedure only. What is said or done within its walls cannot be inquired into elsewhere. The House of Commons cannot, by resolution, change the law of the land, but Courts of law have no power to inquire into the propriety of a resolution of the House restraining a member from doing within the walls of the House an act which he may have a right by law to do.

NOTE II.—PRIVILEGE OF PARLIAMENT AND THE
COURTS.

The whole subject of the Privilege of Parliament is much too large to be treated in a short note ¹ But we must not omit to consider what is for our purpose the most interesting aspect of the subject, and one of the most difficult questions in constitutional law, viz the extent to which Courts will adjudicate upon matters of privilege The violent controversies produced by this question between the House of Commons and the Courts are indicated in the cases cited above.

Each House of Parliament claims to be the sole judge of its own privileges and of what constitutes a breach of them The Courts have always admitted that the House of Commons possesses that authority to commit summarily for contempt which exists in every superior Court of law ²; and the Judges always give a liberal construction to the warrants of such commitments, which are not reversible upon mere matters of form But this has not contented the House of Commons They have not thought it sufficient to enforce their undoubted privileges, but have at various times claimed in effect a power of legislation by asserting an exclusive right to entertain all questions connected with privilege, and that the Courts should act ministerially only in matters of privilege, accepting or enforcing any declaration of either House They have even denied that the Judges could ascertain what is the law of privilege, as though it were a matter of inspiration vouchsafed only to themselves ³

The opinions of the Judges in the matter have varied very much During the eighteenth century the tendency was strong in favour of declining to decide questions of privilege in any way, and the natural result followed, that privilege was pushed to an extravagant extent The House of Commons constantly decided the subjects of common actions as matters of privilege, solely because one of the parties interested happened to be one of their own body ⁴ Even in the case of

¹ Cox, *Inst. Eng Gov*, pp 204 *et seq* May, *Parl Prac* (12th ed), 66

² *Per Ellenborough, C J*, in *Burdett v Abbot*, 14 East, at p 138; and cp Lord *Erskine* in the House of Lords on the same case, 5 Dow, at p 200

³ Argument of Attorney-General in *Stockdale v Hansard*, 9 A & E, at

p. 31

⁴ *Denman, C J.*, in *Stockdale v Hansard*, and for some flagrant instances, see 9 A & E, p 12 Amongst them were the following, which were all treated as breaches of privilege, with the result that the offenders either had to make

Ashby v White, however, *Holt*, C J, expressly asserts the right and duty of the Courts to know the law of Parliament as part of the law of the land. And the later decisions have been much more favourable to the right of the Courts to entertain questions of privilege. For this *Stockdale v Hansard* is the leading authority. There Lord *Denman*, C J, lays down that although the House of Commons has a right to declare what are and have been its privileges, it may not under cover of a declaration create any new privilege. That would be to give to the resolution of a single branch of the Legislature the force of a legislative enactment. It is true that the House of Commons disclaim the power to make new privileges. But the claim the House does assert will amount to the same thing, if its members alone are competent to declare the extent of their privileges, and if a Court of law is concluded from going behind their declaration.⁵

Lord *Denman* also points out that "it must be remembered that during the session privilege is more formidable than prerogative, which must avenge itself by indictment or information involving the tedious process of law, while privilege, with one voice, accuses, condemns, and executes."

The present condition of the question is, according to Sir *Erskine May*, unsatisfactory. "Assertions of privilege are made in Parliament, and denied in the Courts, the officers who execute the orders of Parliament are liable to vexatious actions; and if verdicts are obtained against them, the damages and costs are paid by the Treasury. The parties who bring such actions, instead of being prevented from proceeding with them by some legal process acknowledged by the Courts, can only be coerced by an unpopular exercise of privilege which does not stay the actions."⁶ He suggests that a statute analogous to the Act of 1840, by which collisions between Parliament and the Courts might be prevented, should be passed. "It is not desired that Parliament should, on the one hand, surrender any privilege that is essential to its dignity, and to the proper exercise of its authority; nor, on the other,

satisfaction or were taken into custody. Impounding a member's cattle, lopping his trees, detaining his goods, serving his tenant with process, taking his horse from a stable and riding it, digging his coal, ploughing his land, killing his rabbits, assaulting his porter, fishing in his pond, erecting a fence on his waste. On one occasion an attorney was committed for delivering an exorbitant bill of costs for the preparation of a petition to the House and for threatening to sue for the amount.

⁵ The true distinction is made by Lord *Clarendon*, who construes the doctrine that the House of Commons are the only judges of their own privileges, to mean that they are the only judges in cases where their privileges are offended against, and not that they only can decide what are and what are not their privileges. 1 *Hist. Rebellion*, pp. 562—564.

⁶ *Parliamentary Practice* (12th ed.), p. 138.

that its privileges should be enlarged But some mode of enforcing them should be authorised by law analogous to an injunction issued by a Court of Equity to restrain parties proceeding with an action at common law . . . and that such prohibition should be binding, not only upon the parties, but upon the Courts ”

ALLEGIANCE.

Calvin's Case.

4 Rep. 1; 2 St. Tr. 559. (1608.)

Case.] James I was anxious that the union of the two crowns should confer mutual naturalization upon his English and Scotch subjects; and when the English House of Commons was unwilling that this should be so, the question was raised by two collusive actions in the name of Robert Calvin, a *postnatus* of Scotland, i.e., one born after the union of the crowns. One of these actions was brought in the King's Bench claiming that Calvin was entitled to certain freehold land in England (which he could not then be if he were an alien), and the other in Chancery for the title deeds of the estate. The defendants pleaded in abatement that Calvin was an alien. On a demurrer to this plea the case was argued in the Exchequer Chamber before the *Lord Chancellor* and twelve Judges.

Allegiance is the obedience due to the Sovereign; and persons born in the allegiance of the King are his natural subjects, and no aliens. This natural allegiance is not limited to any spot—*nullis finibus premitur*—and is due to the King in his natural capacity, rather than his politic, of which he has two, one for England, and one for Scotland. One allegiance is due by both kingdoms to one Sovereign.

The point is, whether internaturalization follows that which is one and joint, or that which is several; for if the two realms were united under one law and Parliament, the *postnatus* would be naturalized. As it is, the King is one; but the laws and Parliament are several.

Held —That the plea was bad; it following that the *postnati* were not aliens, and might therefore inherit land in England.

NOTE III.—ALLEGIANCE AND ALIENS.

Note—The reasons given for the decision in *Colvin's Case* were to some extent based upon the somewhat exaggerated notions of "divine right" characteristic of the Stuarts, and of many lawyers of that time. By the Act of Union, however, which has united the two kingdoms into one, much of the learning involved has been rendered unnecessary and obsolete. Allegiance is defined by Coke to be "a true and faithful obedience of the subject due to his sovereign." It is correlative with protection, and so ceases when the sovereign can no longer *de jure* protect his subjects¹, thus allegiance is changed by conquest, or by cession of territory under a treaty². It is not governed by locality, but clings to the subject wherever he is *nemo potest exuere patriam*. And it is indefeasible—its obligation is for life. This was the earlier common law doctrine as to allegiance, but it has been much modified by modern legislation.

The law of nationality now rests upon the common law and three statutes of 1914, 1918, and 1922, which are now printed as one statute and cited as the British Nationality and Status of Aliens Acts, 1914 to 1922. At common law, with certain exceptions, all persons born within the British Dominions are natural-born British subjects. By the Act the following persons are deemed to be natural-born British subjects.

viz —

- "(a) Any person born within H.M.'s dominions and allegiance;
- "(b) Any person born out of H.M.'s dominions whose father was at the time of that person's birth a British subject and who fulfils any of the following conditions, *viz* —
 - "(1) his father was born within H.M.'s allegiance; or
 - "(2) his father was a person to whom a certificate of naturalisation had been granted; or
 - "(3) his father had become a British subject by reason of any annexation of territory; or
 - "(4) his father was at the time of that person's birth in the service of the Crown; or
 - "(5) his birth was registered at a British consulate within one year, or in special circumstances, with the consent

¹ "Allegiance is the tie or *ligamen* which binds the subject to the king in return for that protection which the king affords the subject": 1 Bl. Comm. 366.

² Forsyth, Cases and Opinions on Constitutional Law, p. 334.

of the Secretary of State, two years after its occurrence, or in the case of a person born on or after the first day of January, 1915, who would have been a British subject, if born before that date, within twelve months after the first day of August, 1922, and

“(c) Any person born on board a British ship whether in foreign territorial waters or not ”

It will be observed that now British subjects living abroad, whether natural-born or not, can extend British nationality to their descendants born abroad in perpetuity, provided they comply with the provisions of the Act relating to registration.

In *Carlebach's Case*, [1915] 3 K. B. 716; 84 L. J. K. B. 2121, it was held that under the Act of 1870 a naturalized British subject could not transmit his nationality to his children born abroad, who consequently became aliens. It is the better opinion that the inhabitants of conquered territory do not cease to be the subjects of their former Sovereign by annexation accomplished during the war. A complete title can only be acquired either through the cessation of hostilities or by a treaty of peace. Nevertheless this principle was not observed by the Judicial Committee of the Privy Council in *Gout v. Cimitran*, [1922] A. C. 105; 91 L. J. P. C. 18. The plaintiff was born in 1878 in the Ottoman Dominions, and went to reside in Cairo in 1893. In December, 1913, he went to Cyprus, where he resided twenty-three months. It was held that as he was ordinarily resident and actually present in Cyprus at the date of the annexation on November 4, 1914, he was a British subject.

Aliens may still acquire British nationality by special Act of Parliament or may become denizens by grant of letters of denization by the Crown. By the Naturalization Act of 1870 an alien who had resided in the United Kingdom for a term of not less than five years or had been in the service of the Crown for a like period, might apply for a certificate of naturalization. Upon the grant of such certificate he became entitled to all the political rights, powers and privileges, and subject to all the obligations of a natural-born British subject, but he was not to be deemed a British subject unless he had ceased to be a subject of his former State. The certificate did not take effect until the applicant had taken the oath of allegiance.

Although the Act stopped short of expressly declaring that naturalized aliens should be deemed to be natural-born British subjects, it seems clear that such was the intention. Such was the interpretation placed upon the section in *R. v. Speyer*, [1916] 1 K. B. 595; [1916] 2 K. B. 858; 85 L. J. K. B. 630; 85 L. J. K. B. 1626, in which it was

sought to exclude the defendant from the Privy Council on the ground that he was disqualified as a naturalized alien for that office by the Act of Settlement of 1700. Prior to this Act, an alien could not become a member of Parliament, nor could he possess the parliamentary franchise. He could, however, be a Privy Councillor, since the Sovereign was not restricted at common law in his choice of councillors. But upon naturalization he acquired all the rights, privileges and capacities of a natural-born British subject.

By section 3 of the Act of Settlement, however, no person born out of the realm or dominions (although naturalized or a denizen, except born of English parents), was eligible to the Privy Council or to either House of Parliament, or to certain specified offices.

By section 3 of the Act of 1914, a person to whom a certificate of naturalization is granted, subject to the provisions of the Act, is entitled to all political and other rights, powers and privileges, and subject to all obligations, duties and liabilities to which a natural-born British subject is entitled or subject, and as from the date of his naturalization to have to all intents and purposes the status of a natural-born British subject.

It was further provided by this section that "Section 3 of the Act of Settlement (which disqualifies naturalized aliens from holding certain offices) shall have effect as if the words 'naturalized or' were omitted therefrom."

It was held, therefore, that section 3 of the Act of Settlement was repealed by implication by section 7 of the Act of 1870 *quoad* naturalized aliens; that section 3 of the Act of 1914 had not revived *quoad* naturalized aliens the disqualification for membership of the Privy Council contained in the Act of Settlement; and that Sir Edgar Speyer upon naturalization was capable of being a Privy Councillor. The Court expressed the view that the wording of the statute was not very happy. The disqualification, however, of denizens still continues, and for this reason denization by letters patent, though preserved by section 25 of the Act of 1914, is likely to fall into disuse.

When naturalization was effected by Act of Parliament it was usual, in the case of any distinguished foreigner, to repeal section 3 of the Act of Settlement so far as he was concerned.

The grant of a certificate of naturalization lies in the absolute discretion of the Secretary of State. He may make such grant if he is satisfied that the applicant has either resided within the British dominions for a term of not less than five years, or been in the service of the Crown for a like term; is of good character and has an adequate knowledge of the English language; and intends to reside in the

British dominions or enter or continue in the service of the Crown. The residence prescribed is residence in the United Kingdom for not less than one year and previous residence either in the United Kingdom or in some other part of the British dominions for a period of four years within the last eight years before the application. A certificate has no effect until the applicant has taken the oath of allegiance.

By complying with the provisions relating to naturalization contained in the principal Act, the Government of any British possession may confer upon aliens residing in its territory imperial naturalization, i.e., the status of a natural-born British subject in any part of the British Empire. The powers of the British Secretary of State may be exercised by such Government upon the same terms *mutatis mutandis*, and in those possessions in which another language is officially recognised with English, an adequate knowledge of either language may be accepted. The dominions of Canada, Australia, and Newfoundland have adopted this part of the principal Act. But where a possession has not adopted the Act, a person naturalized by the Government of such possession is not a British subject within the United Kingdom. This point was raised during the war of 1914 under the Act of 1870, by which the Legislature of a British possession was empowered to make laws "for imparting to any person the privileges or any of the privileges of naturalization, to be enjoyed by such person within the limits of such possession." In *Rex v. Francis, ex p. Markwald*, [1918] 1 K. B. 617, 87 L. J. K. B. 620, Markwald was born in Germany in 1859 and in 1878 went to Australia, where, in 1908, he took the oath of allegiance and was granted a certificate of naturalization under the Australian Act, 1903. He subsequently came to reside in London and was charged and convicted of being an alien. It was held that taking the oath of allegiance and the grant of a certificate did not make Markwald a British subject in the United Kingdom.

"A man," said *Darling, J.*, "may become the liege subject of the King in some parts of his dominions, yet not in all; and wherever he is not a subject, he is an alien." As was said, Markwald's allegiance was local allegiance. No authority had been given by the Sovereign power to anyone to accept any wider allegiance from him. When every British possession has adopted the Act this partial British citizenship will cease to exist. In the meantime the anomaly remains, since a possession may admit aliens to its citizenship upon terms which are not acceptable in the United Kingdom. (See also *Markwald v. Att.-Gen.*, [1920] 1 Ch. 348, 89 L. J. Ch. 225.)

Although the status of a naturalized person has been raised to an equality in general terms with that of a natural-born subject, yet in

other respects it has been substantially modified to his disadvantage. By section 7 of the principal Act, absolute discretion has been conferred upon the Secretary of State to revoke the certificate of naturalization if he is satisfied that the person to whom the certificate has been granted has shown himself, by act or speech, to be disaffected or disloyal. Such act may be indicated by the naturalized person who (a) during war has unlawfully traded or communicated with the enemy or with the subject of an enemy State, or engaged in or associated with any business so as to assist the enemy, or (b) has within five years of the grant of the certificate been sentenced by any Court in His Majesty's dominions; or (c) was not of good character at the date of the grant of the certificate, or (d) has been ordinarily resident out of His Majesty's dominions not less than seven years since the grant, without maintaining substantial connection with such dominions; or (e) remains according to the law of the State at war a subject of that State. A person refusing or neglecting to deliver up his certificate after revocation is liable to a fine not exceeding one hundred pounds.

Disaffection and disloyalty are vague terms and may be compared with the obsolete doctrine of constructive treason. The provisions relating to a clean record and good character prior to the grant as conditions of the retention of the status of a British subject are new in English law. A clean record is quite a reasonable requirement. Every State is entitled to reject persons convicted of serious criminal offences. But "good character" is somewhat vague and is capable of causing injustice. Referring to these provisions, Mr Bentwich says experience alone will show whether it will be desirable to retain the idea of nationality conditional on good behaviour and on keeping in close touch with the British dominions as a permanent class of citizenship.

The revocation of a certificate does not affect the status of the wife and minor children, unless the Secretary of State otherwise expressly directs. But the wife may make a declaration of alienage, whereupon she and the children cease to be British citizens. If, however, the wife is a natural-born British subject, the Secretary of State may not direct revocation of her status.

British nationality may be lost either by naturalization in a foreign State or by a declaration of alienage. The maxim *Nemo potest exuere patriam* prevailed until the Act of 1870, by which it was enacted that any British subject who should become naturalized, or had already become naturalized, in a foreign State should cease to be a British subject.¹ This "right of expatriation" is substantially re-enacted by

¹ See *Dr Story's Case*, Dyer, 298 b; 1 Hale P. C., p. 96

the principal Act. By section 13, a British subject automatically ceases to be such by voluntary naturalization in a foreign State, and by section 14, any person who by birth within the British dominions and allegiance, or on board a British ship, is a natural-born British subject, and also the subject of a foreign State, if of full age and not under disability, may make a declaration of alienage. And any person who, though born out of the British Dominions, is a natural-born British subject, may do likewise and each shall cease to be a British subject.

But to this there is one important exception. Such a person cannot put off his *patria* in time of war either by naturalization in the enemy State or in a neutral State, or by a declaration of alienage. The decision in *R. v. Lynch*, [1903] 1 K. B. 444, 72 L. J. K. B. 167, was followed by the Courts during the War in *Vecht v. Taylor* (1917), 116 L. T. 444; *Ex p. Freyberger*, [1917] 2 K. B. 129; 86 L. J. K. B. 943; and *Gschwind v. Huntington*, [1918] 2 K. B. 420; 87 L. J. K. B. 977.²

On the other hand, where a British natural-born subject during the War was naturalized in Germany, it was held in *Re Chamberlain's Settlement*, [1921] 2 Ch. 533; 91 L. J. Ch. 34, that he was a German subject for the purposes of the execution of the provisions of the Treaty of Versailles, 1919, since the question whether a person was "a German national" within the meaning of Art. 297 of the Treaty and of the Order in Council of August 18, 1919, was to be determined exclusively by German municipal law.

British nationality acquired by naturalization is lost by a declaration of alienage where a convention exists with the country of origin permitting the subjects of that country to divest themselves of the status of British nationality.

It may be noted that the loss of such nationality does not relieve the denationalized person from any liability incurred before such loss.

Fundamental changes in family relations have also been created by the new statute. By section 10, "the wife of a British subject shall be deemed to be a British subject and the wife of an alien shall be deemed to be an alien. Provided that where a man ceases during the continuance of his marriage to be a British subject it shall be lawful for his wife to make a declaration that she desires to retain British nationality and thereupon she shall be deemed to remain a British subject."

² See also *De Jager v. Att.-Gen. of Natal*, [1907] A. C. 326; 76 L. J. P. C. 62.

In one respect this section is open to grave objection. The result is that if a British woman marries a stateless person, she also becomes stateless. Under the common law, a British woman upon marrying an alien retained her British nationality, and this was not affected by the Act of 1844. By the Act of 1870, however, upon marriage with an alien she became the subject of the State of which her husband was a subject, but if her husband was stateless she retained her British nationality under the common law.

Statelessness has long been recognised in international law, but in England no attention was paid to this question until in *Ex p. Weber*, [1916] 1 K B 280 n., [1916] A C. 421, 85 L J. K B 217 n.; 85 L J K. B 944, *Phillimore*, L J, doubted whether a person could be stateless. But in *Stoeck v The Public Trustee*, [1921] 2 Ch 67, 90 L J. Ch. 386, *Russell*, J, recognised the existence of statelessness as a legal fact in English law. By section 11, a woman who, having been a British subject, by marriage becomes an alien, shall not by the death of her husband or by the dissolution of the marriage cease to be an alien and, conversely, an alien woman who by marriage becomes a British subject does not under similar conditions cease to be a British subject. The rule having been established that the wife takes her husband's nationality, it was thought desirable to state with precision that the death of the husband or the dissolution of the marriage did not *ipso facto* cause any change in the status of the wife. It is otherwise with a decree of nullity, in which case the woman regains her former nationality, since, if there is no marriage, the woman has not acquired the nationality of the man.

It should be noted that by 7 & 8 Vict c 66, s. 16, an alien woman upon marriage with a natural-born subject or person naturalized becomes naturalized and acquires the status of a natural-born British subject. *R. v Manning* (1849), 19 L J M C 1; 4 Cox C C 31.

The disability, however, of a British subject to change his nationality during war does not apply to a natural-born British woman upon marriage with an alien, even though the alien be an enemy. In *Fasbender v. Att.-Gen.*, [1922] 2 Ch 850; 91 L J Ch 791, where a British-born woman married a German after the Armistice, but before the ratification of the Treaty of Versailles, 1919, it was held that she became a German upon her marriage, and consequently her property became subject to attachment as that of a German.

By section 12, the minor children of a British subject who loses his British nationality by declaration of alienage or otherwise, cease to be British subjects, if by the law of any other country they become naturalized in that country. That this section has failed to solve the

anomaly of double nationality is illustrated by the case of *Atkinson v. Recruiting Officer (Bury St Edmunds)* (1917), 116 L T 305; 86 L. J. K B 415. In this case the appellant was born at Chicago in 1889, his father being a natural-born British subject. In 1896, his father became a naturalized American citizen, and within a few months the appellant came to England, where he continued to reside. By American law the naturalization of the father confers American citizenship upon the minor children "if such citizenship shall begin at the time such minor children begin to reside permanently in the United States."

Upon the facts it was held that the appellant did not begin to reside permanently in the United States, and that consequently he was not an American citizen. And since, at the time of his birth, his father was a natural-born British subject, the appellant was a British subject. The point, however, was not taken that by section 1992 of the Revised Statutes of the United States, the appellant having been born within the allegiance and jurisdiction of the United States was an American citizen. A letter from the American embassy was, indeed, admitted in evidence, in which the opinion was expressed that the appellant was an American citizen and also a British subject. As the appellant, at the time he left the United States, was a minor and consequently could have no mind of his own, and there was no evidence of the intention of the father, it would seem impossible to say that he did not begin to reside permanently in the United States. If the appellant became automatically naturalized in the United States upon the naturalization of his father, he would appear by this section to have lost his British nationality. If not, he possessed double nationality.

REMEDY AGAINST THE CROWN.

Danby's Case.

11 *St. Tr.* 599. (1679.)

Case.] The first article of impeachment for high treason against Lord Danby, Lord High Treasurer, recited that he had traitorously encroached to himself regal power by treating in matters of peace and war with foreign ministers and giving instructions to His Majesty's Ambassadors abroad without communicating the same to the Secretaries of State and the rest of the Council and against the express declaration of His Majesty and his Parliament; thereby intending to defeat and overthrow the provisions that had been deliberately made by His Majesty and his Parliament for the safety and preservation of His Majesty's kingdom and dominions. This article referred to the letter of March 25, 1678, from Danby to Montague, then Ambassador of the Court of Louis XIV, instructing him to conclude a secret treaty of peace with Louis. If the treaty was concluded Charles was to receive six million livres a year for three years, and so render him independent of Parliament. This letter was written by the express command of Charles and countersigned by him as follows: "This letter is writ by my order, C. R." Since, in virtue of the maxim, "The King can do no wrong," the Commons could not touch Charles, they placed the responsibility upon Danby, for although the Sovereign is personally immune, his ministers are not, whether they act under his express orders or not. In his defence Danby contended that the King's own order, as expressed in the letter itself, was sufficient to justify obedience, in any case not unlawful. "I believe," he said, "there are very few subjects but would take it ill not to be obeyed by their servants, and their servants might as justly expect

their masters' protection for their obedience." The letter "was written by the King's command upon the subject of peace and war, wherein His Majesty alone is at all times sole judge and ought to be obeyed not only by any of his ministers but by all his subjects." In no case, he declared, ought a Minister of State to be made a sacrifice to the will of the people. Since the charge amounted to misdemeanour only and not to felony, the Lords rejected the motion to commit Danby to the Tower. But upon the revival of the impeachment after the dissolution by the new House of Commons, the Lords made no further objection and Danby was committed. On being required to give in his written answer to the charges, Danby produced a pardon under the Great Seal given after the commencement of the proceedings with a view to their bar. The Commons protested and resolved that the pardon was illegal and ought not to be pleaded in bar of an impeachment. By such plea the Crown was made directly and personally responsible for the very same act which the Commons had made matter of impeachment. This question was ultimately set at rest by the Act of Settlement (12 & 13 Will. 4, c. 2) s. 3, whereby no pardon under the Great Seal may be pleaded to an impeachment by the Commons. The Commons also denied the right of the bishops to vote on the validity of the pardon and demanded a joint committee to regulate the form and manner of the proceedings on the impeachment. The Lords accepted the committee but resolved that the spiritual Lords had a right to sit and vote in Parliament in capital cases until judgment of death shall be pronounced. Owing to these disputes Parliament was prorogued before anything further could be done and in the next Parliament Danby's impeachment was dropped. Meanwhile Danby remained in the Tower. In 1682 on a writ of *habeas corpus* he applied for bail, which was refused by the Court on the ground of its incompetency to interfere in an impeachment which was still before the High Court of Parliament. Upon Jeffrey becoming Chief Justice of the King's Bench he was bailed to appear at the Lords' Bar

the first day of the then next Parliament,¹ and in 1685 the order for impeachment was reversed and annulled.

Note—This impeachment went a long way to establish the principle of ministerial responsibility that a minister cannot shelter himself by a plea of obedience to the command of the Sovereign. It also illustrates that a pardon cannot be pleaded during the course of the proceedings. The prerogative of pardon can only be exercised after conviction. Further, that the proceedings on impeachment are not abated by the prorogation or dissolution of Parliament, that, imprisonment by order of the Lords does not abate by the prorogation or dissolution of Parliament, and that if no overt act appears in the charge of treason or felony, the defendant must be admitted to bail.

¹ 2 Shower Rep 335

PROPERTY.

The Case of the King's Prerogative in Saltpetre.

12 Rep. 12. (1606.)

Case.] *It was resolved* by the Judges sitting at Serjeants' Inn that although the King may not cut the trees of a subject growing upon his freehold, nor take gravel for the repair of the King's houses, he may dig for saltpetre and take it, for saltpetre extends to the defence of the whole realm. And although the King cannot charge the subject for the making of a wall about his own house or to make a bridge to come to his house, since that does not extend to the public benefit, "when enemies come against the realm to the sea-coast, it is lawful to come upon my land adjoining to the same coast, to make trenches or bulwarks for the defence of the realm, for every subject hath benefit by it. And therefore by the common law every man may come upon my land for the defence of the realm, as appears by 8 Edw. 4, 23. And in such case in such extremity they may dig for gravel, for the making of bulwarks; for this is for the public and every one hath benefit by it; but after the danger is over, the trenches and bulwarks ought to be removed, so that the owner shall not have prejudice in his inheritance; and for the commonwealth, a man shall suffer damage; as for saving of a city or town, a house shall be plucked down if the next be on fire; and the suburbs of a city in time of war for the common safety shall be plucked down; and a thing for the commonwealth every man may do without being liable to an action, as it is said in 3 Hen. 8, pl. 15. And in this case the rule is true, *Princeps et respublica ex justa causa possunt rem meam auferre* "

Note.—It was said by Lord *Dunedin* in *De Keyser's Case*, *infra*, that "the most that could be taken from them [*i e*, the opinions of the

Judges] was that the King, as *suprema potestas*, endowed with the right and duty of protecting the realm, was, for the purpose of the defence of the realm, entitled to take any man's property, and that the texts gave no certain sound whether this right to take was accompanied by an obligation to make compensation to him whose property was taken "

Re X's Petition of Right.

[1915] 3 K. B. 649; 84 L. J. K. B. 1961.

Case.] In December, 1914, the military authorities took and entered into possession of certain land and buildings, the property of the suppliants, for the purpose of an aviation ground or aerodrome. The suppliants claimed that they were lawfully entitled under the Defence Act, 1842, or under the Military Land Act, 1892, or other Acts amending the same, to proper compensation. The Crown contended that the land was taken by virtue of His Majesty's Royal Prerogative and of the Defence of the Realm (Consolidation) Act, 1914, and of the Regulations thereunder, and denied that compensation was by law payable as alleged or at all.

Judgment.—*Aiory, J.*, found as a fact that possession and occupation of the land and premises was in the opinion of the competent military authorities necessary for the public safety and the defence of the realm. After referring to the cases of *Rex v. Hampden*, the *Saltpetre Case* and *Hole v. Barlow* (1858), 27 L. J. C. P. 207; 4 C. B. (N.S.) 334, in which *Willes, J.*, said: "Every man has a right to the enjoyment of his land; but in the event of invasion the Queen may take the land for the purpose of setting up defences thereon for the general good of the nation. In these and such like cases private convenience must yield to public necessity." The learned Judge came to the conclusion "that His Majesty, by virtue of his war prerogative, through his representatives, was under the existing circumstances entitled to take possession of the land and premises in question and still was entitled to occupy the same without making compensation." And he

came to the same conclusion after considering the effect of the statutes under which the suppliants claimed compensation. This decision was affirmed by the Court of Appeal. Upon the appeal to the House of Lords¹ and after the arguments had lasted several days, the Attorney-General said he had come to the conclusion that in the special circumstances the suppliants had some ground for supposing that the Crown had proceeded under the Defence Act, 1842, which provided for compensation. The Crown therefore would pay such compensation as might be determined by arbitration. Upon those terms the appeal was allowed to be withdrawn.

Re De Keyser's Royal Hotel, Ltd.; De Keyser's Royal Hotel Ltd. v. The King.

[1919] 2 *Ch.* 197; [1920] *A. C.* 508; 88 *L. J. Ch.* 415;
89 *L. J. Ch.* 417.

Case.] The suppliants were the owners for a term of years of the De Keyser's Royal Hotel, the business of which was being carried on by Mr Whinney as receiver for the debenture-holders. The premises being required by the War Office and negotiations having broken down over the amount of rent, possession was taken by the Army Council under the Defence of the Realm Regulations and upon the terms that compensation would be *ex gratia*, the amount to be determined by the Defence of the Realm (Losses) Commission. Whinney gave possession but rejected the reference to arbitration and claimed full compensation as of right. The premises were at first used by members of the Air Service, but when the Air Board was formed, the Air Service moved to the Hotel Cecil, and the premises were subsequently used by the Government for other sections of the War Office. They were throughout used for administrative purposes

¹ 32 T. L. R. 699 (1916)

Peterson, J., dismissed the petition, holding that he was bound by the decision of the Court of Appeal in *Re X's Petition of Right*. On the appeal it was contended by the Crown that the premises were taken by a competent military authority for the use of His Majesty by virtue of the royal prerogative and of the powers conferred by the Defence of the Realm (Consolidation) Act, 1914, and of the Regulations issued thereunder. The Crown claimed no right or interest in the premises beyond the right to take and use them for so long as might be necessary for securing the public safety and the defence of the realm during the continuance of a state of war. They denied that any rent or compensation was by law payable either under the Defence of the Realm Act or at all. Upon the conclusion of the arguments the case was ordered to stand over for the examination of the records, from which it appeared that from a very early period to modern times the Crown had never taken the subject's land without paying for it and that there was no trace of any claim by the Crown to such a prerogative. In delivering judgment *Swinfen Eady, M R.*, declared that where a matter within the prerogative is provided for by statute, the prerogative is merged in the statute. In the Defence Act, 1842, provision is made for payment "either for the absolute purchase thereof or for the possession of the use thereof during such time as the exigence of the public service shall require." Such right to payment was not abolished by the Defence of the Realm Act, 1914. He distinguished the case of *Re X's Petition of Right*. In that case the taking possession of the land was justified upon the same ground as entering upon land adjoining the sea-coast to dig trenches. The aerodrome was actually required for the conduct of hostilities. It had no application to the present case, where possession of land and buildings was taken for administrative purposes. *Warrington, L J.*, delivered judgment to the same effect, and it was held (*Duke dissenting*) that the Crown is not entitled as of right, either by virtue of the prerogative, or under any statute, to take possession of the

property of the subject and use it for administrative purposes in connection with the defence of the realm, without paying compensation for its use and occupation

Judgment —On appeal to the House of Lords the decision of the Court of Appeal was affirmed. Upon the claim made by the Crown in virtue of the prerogative Lord *Par Moor* in his judgment declared the constitutional principle to be that "when the power of the Executive to interfere with the property or liberty of the subject had been placed under Parliamentary control and directly regulated by statute, the Executive no longer derives its authority from the Royal Prerogative of the Crown, but from Parliament, and that in exercising such authority the Executive is bound to observe the restrictions which Parliament has imposed in favour of the subject." It was *held* therefore (1) that the suppliants were not entitled to a rent for use and occupation apart from statute, since there was no consensus on which to found an implied contract; (2) that Regulation 2 of the Defence of the Realm (Consolidation) Act, 1914, when read with sub-section 2 of section 1 of the Act, conferred no new powers of acquiring land, but authorised the taking possession of land under the Defence Act, 1842, while impliedly suspending the restrictions imposed by that Act upon the acquisition and user of land; (3) that the Crown had no power to take possession of the premises in right of its prerogative *simpliciter*; and (4) that the suppliants were entitled to compensation in the manner provided by the Act of 1842.

Robinson & Co., Ltd. v. The King.

90 *L. J. K. B.* 1177; 37 *T. L. R.* 698. (1921.)

Case.] In this case the Food Controller requisitioned a quantity of bran and pollards, the property of the suppliants. The Minister and the suppliants were unable to agree on the price or on the tribunal by which the price should be determined

The suppliants accordingly presented a petition of right in which they prayed for a decision on these points. It was contended for the Crown that the requisition was made under Reg. 2B of the Defence of the Realm Act, and that the suppliants were legally entitled to have the price determined by the Defence of the Realm (Losses) Commission. It appeared, however that the Commission had refused to entertain the present case

Judgment—The Court came to the conclusion that the suppliants had a legal claim to compensation, the amount of which claim must be ascertained in accordance with the directions laid down in Reg. 2B for determining prices, and that, as the tribunal referred to in the Regulations did not determine claims such as theirs, the suppliants were not debarred from seeking to have the amount of their claim ascertained in the High Court, and that having established their legal right to be paid and no agreement having been reached as to the amount to which they were entitled, they had established their right to an account at their own risk as to costs.

Note.—Reference should be made to the remarks of Lord Atkinson on this point in *Central Control Board v Cannon Brewery Co*, 35 T. L. R., at p. 554; [1919] A. C. at p. 752; 88 L. J. Ch. 464, where he said that the rule is "That an intention to take away the property of the subject without giving him a legal right to compensation for the loss of it, is not to be imputed to the Legislature, unless that intention is expressed in unequivocal language." See also *Newcastle Breweries, Ltd. v The King* [1920] 1 K. B. 854; 89 L. J. K. B. 392, and comments thereon of Lord Dunedin in *Att.-Gen. v De Keyser's Royal Hotel, Ltd.*, [1920] A. C. 508; 89 L. J. Ch. 417; and *Hudson's Bay Co v MacLay*, 36 T. L. R. 469. Reference should also be made to the observation of Wright, J., in *France, Fenwick & Co., Ltd. v The King*, (1926), 43 T. L. R. 18, where he said. "I shall assume that the Crown has no right at common law to take a subject's property for reasons of State without paying compensation. But I think the rule can only apply (if it does apply) to a case where property is actually taken possession of, or used by the Government, or where by the order of a competent authority it is placed at the disposal of the Government."

PETITIONERS ENTITLED UNDER A GRANT.

Lord Mayor, etc., of Dublin *v.* The King.

[1911] 1 *Ir. R.* 88.

Case.] This was a petition of right by the Lord Mayor, Aldermen and Burgesses of the City of Dublin asking for a declaration that they were entitled to be paid £3,059 out of a specific part of the Local Taxation (Ireland) Account. This sum represented the suppliants' proportion of the grant-in-aid, which, as they submitted, should have been paid to them under section 58 of the Local Government (Ireland) Act, 1898, for the cost of maintenance of pauper lunatics in the Richmond Lunatic Asylum during the first quarter of the year 1899.

Judgment —*Barton, J* , held that the Act imposed on the Lord Lieutenant the obligation, out of moneys granted from the Consolidated Fund to the Local Taxation (Ireland) Account, to cause certain sums, or a rateable proportion thereof, to be annually paid to each county council. He found that the proper moneys of the suppliants were withheld by the Crown under a mistake of fact, and remained in the hands of the Crown. Following the view expressed in *Kildare County Council v. The King*, [1909] 2 *Ir. R.* 199, he held that a petition of right lies in case of grants made by or on behalf of the Crown and none the less when the grant is with the assent of Parliament. This decision was affirmed by the Court of Appeal.

MONEY PAID AS DUTY.

Campbell v. Hall.

Lofft, 655; 1 *Cowp.* 204; 20 *St. Tr.* 239—354, and 1387. (1774.)

Case.] This was an action against the collector of customs in the island of Grenada to recover money paid as duty upon exports, on the ground that the duty had been illegally imposed.

It appeared that Grenada had been conquered from the French in February, 1762. By a Proclamation in October, 1763, the Crown had delegated to the Governor power to legislate with the advice and consent of a Council and an Assembly of Representatives. In July, 1764, letters patent were issued under the Great Seal, imposing a duty upon exports from Grenada.

The question was, whether the Crown, after the Proclamation of 1763, could still impose a new duty, and this was argued three times upon a special verdict before Lord *Mansfield*, C J., who gave judgment for the plaintiff

Held.:—That the Crown, having once delegated the power of legislation (including taxation) to a local assembly, cannot afterwards exercise the power of levying taxes there.

In the course of his judgment Lord *Mansfield* affirmed the following amongst other propositions:—That a country conquered by the British arms becomes a dominion of the Sovereign in right of his Crown, and therefore necessarily subject to the legislative power of the British Parliament, that the conquered inhabitants when once received into the conqueror's protection become British subjects and are no longer enemies or aliens; that the laws of a conquered country continue until they are altered by the conqueror; that, conceding that the Sovereign has power without the concur-

rence of Parliament to make new laws for a conquered country, although this is a power subordinate to his power of legislation in Parliament, he can make no laws which are contrary to fundamental principles, as *e.g.*, giving exemptions from the authority of Parliament, or privileges exclusive of his other subjects.

Note—In *Spring v Sigcau*, [1897] App Cas. 238; 66 L J P C 44; 76 L T 127, after the annexation of Pondoland to Cape Colony, the Governor issued a Proclamation commanding the arrest of Sigcau, formerly an independent native chief exercising paramount authority in Pondoland. In affirming the order of the Supreme Court of the colony for the release of Sigcau, the Judicial Committee held that the Governor had no power to make "new laws" The Proclamation exceeded any delegated authority possessed by the Governor in two particulars (1) It was a new and exceptional piece of legislation differing entirely from any of the laws, statutes and ordinances which he was authorised to proclaim, (2) it in substance repealed the whole of the existing law with respect to criminal proceedings in so far as Sigcau was concerned On the other hand, in *R. v. Crewe (Earl)*, *Ex p Sekgome*, [1910] 2 K B 576; 79 L J. K. B 874, where the High Commissioner for South Africa caused Sekgome, chief of the Butawana tribe in the Bechuanaland Protectorate, to be arrested and detained in prison, the Court of Appeal upheld the refusal to grant a writ of *habeas corpus* on the ground that the Proclamation was issued by virtue of Orders in Council made expressly in exercise of the powers given by the Foreign Jurisdiction Act, 1890,¹ and which clothed the High Commissioner with all His Majesty's power and jurisdiction in territories outside His Majesty's dominions The effect of the Orders in Council and the Proclamation taken together was, in respect of the Bechuanaland Protectorate, to give His Majesty absolute power, subject to the provisions of an Act of Parliament, to say from time to time what law should be applied there, just as if the territory had been the subject of absolute conquest

¹ 53 & 54 Vict c 37

CONTRACT.

Bankers' Case.

1 *Freeman*, 331; *Skinn.* 601; 14 *St. Tr.* 1. (1691.)

Case.] Charles II having contracted loans with the petitioners who were bankers, in consideration granted to them and their heirs annuities, chargeable upon the hereditary revenue of excise given to the King by 12 Car. 2, c. 24 The annuities being many years in arrear the bankers petitioned the Barons of the Exchequer for the arrears. Two questions arose: (1) Whether the grant of the King bound his successor, so as to continue a charge upon the revenue; (2) Whether the petitioners had adopted the proper remedy.

Held:—By a majority of the Judges (1) that the grant was good to charge the successor, although the King could not grant away his Kingdom nor put it in vassalage or subjection to the Pope or any other, but it must be said of whose lands to be received or else it is not good, for he cannot charge his person; that although out of an incorporeal inheritance it was good; that it was an interest; and a licence coupled with an interest was irrevocable; (2) that the remedy by petition to the Barons was a proper remedy and it was in their power to relieve the petitioners and give judgment for them. Upon a writ of error in the Exchequer Chamber this judgment was reversed upon the ground that the Barons of the Exchequer were not authorised to make orders for payments upon the Exchequer and therefore that the remedy by petition to them was inapplicable. This judgment was in turn reversed on error in Parliament.

Note.—In *Macbeath v. Haldimand*, *infra*, Lord Mansfield said “that great differences had arisen since the Revolution with respect

to the expenditure of public money. Before that period, all the public supplies were given to the King, who in his individual capacity contracted for all expenses. He alone had the dispensation of the public money. But since that time, the supplies had been appropriated by Parliament to particular purposes, and now whoever advances money for the public service trusts to the faith of Parliament. That according to the tenor of Lord Somers' argument in the *Bankers' Case*, though a petition of right would lie, yet it would probably produce no effect. No benefit was ever derived from it in the *Bankers' Case* and Parliament was afterwards obliged to provide a particular fund towards the payment of those debts." By 12 & 13 Will 3, c 12, s 15, in lieu of the annuities, the hereditary excise was charged as from December 26, 1701, with annual sums equal to an interest of 3 per cent till redeemed by payment of one moiety of the principal sums, amounting to £1,328,526

The proceeding in the Exchequer seems to have been on the plea side, and was called a *monstrans de droit*. For Lord Somers' argument in the Exchequer Chamber, see 14 St Tr., at p. 39

Macbeath v. Haldimand.

1 T. R. 172; 1 R. R. 177. (1786.)

Case.] The defendant, as Governor of Quebec, had entered into certain contracts with the plaintiff to be supplied with goods for the public service. Upon the ground of their being unreasonable, only a part of the plaintiff's charges had been paid by the Treasury, and he was left to his remedy for the rest.

He then brought this action for his further claim against the defendant, and the jury, under direction, found for the latter.

Upon motion for a new trial the rule was discharged by Lord Mansfield, C.J., Willes, Ashurst, and Buller, JJ.

Held:—That the defendant was not personally liable. The goods were for the use of the Crown, as the plaintiff well knew. Great inconveniences would result from considering a governor or commander as personally responsible in such

cases. For no man would accept of any office of trust under Government upon such conditions.

Note—See also *Palmer v Hutchinson*, 6 App Cas 619; 50 L. J. P. C 62; 45 L. T 180, where the above case was followed. Of course it is possible in cases of this kind for the public officer, like any other agent, to make himself liable personally by an express contract that he will be so liable (as in *Graham v. Public Works Commissioners*, [1901] 2 K. B. 781; 70 L. J. K. B. 860, 85 L. T 96, 50 W. R. 122, 65 J. P. 677), but there must be distinct evidence of such a contract. Moreover the common law doctrine that an agent, who makes a contract on behalf of his principal, is liable to the other contracting party for a breach of an implied warranty of his authority to enter into the contract, has no application in the case of a contract made by a public officer acting as such on behalf of the Crown, *Dunn v Macdonald* [1897] 1 Q. B. 555; 66 L. J. Q. B. 420, 76 L. T. 444; 45 W. R. 355.

Gidley v. Lord Palmerston.

3 *Brodr. & B.* 275; 24 *R. R.* 668. (1822.)

Case.] This was an action against the defendant, as Secretary of State for War, by the executor of a War Office clerk for arrears of retired allowance, which the defendant was authorised to pay out of moneys provided by Parliament. At the trial a verdict was found for the plaintiff subject to the opinion of the Court.

The special case was argued before *Dallas*, C.J., and the Court of Common Pleas.

Held:—"That an action will not lie against a public agent for anything done by him in his public character or employment, though alleged to be, in the particular instance, a breach of such employment."

Note.—With this and the previous case may be compared *O'Grady v. Cardwell*, 1872; 21 W. R. 340 (cp 20 W. R. 342)

It was held in *Leaman v The King*, [1920] 3 K. B. 663; 89 L. J. K. B. 1073, following *Mitchell v The Queen* (1890), 6 T. L. R. 181; cited [1896] 1 Q. B. 121 n, 122 n, that all engagements between those

74. *LEGAL LIABILITY OF THE EXECUTIVE.*

in the military service of the Crown and the Crown are voluntary only on the part of the Crown, and give no occasion for an action in respect of any alleged contract, and that this rule applies to private soldiers as well as to officers. Neither will a petition of right lie by a private soldier for his pay.

And where the Crown had given an undertaking to neutral ship-owners who had acted upon the faith of it and the Crown withdrew the undertaking, it was held by *Rowlatt, J.*, that the undertaking by the Crown was not enforceable in a Court of Law, since it was not within the competence of the Crown to make a contract which would have the effect of limiting its power of executive action in the future. *Rederiaktienbolaget Amphitrite v. The King*, [1921] 3 K. B. 500, 91 L. J. K. B. 75.

TORT.

Lane v. Cotton and another.

1 *Salkeld*, 17; 1 *Ld. Raymond*, 646. (1701.)

Case.] Sir Robert Cotton and another were appointed Postmasters-General by letters patent, with power to appoint deputies and servants. The plaintiff sued them for the loss of some exchequer bills which, by the alleged negligence of the defendants, were stolen from a letter in the post-office.

The case came before *Holt*, C J, and three other Judges. *Holt* held that the defendants were liable, but the three other Judges held that it was impossible for the Postmaster-General, who had to execute this office in such distant places at home and abroad, and at all times, by so many several hands, to be able to secure everything.

Held.:—That a public officer is not liable for the negligence or defaults of his subordinates.

Note—Lord *Raymond* says (at p 658), that the plaintiff intended to bring a writ of error, upon which the defendants paid the money, but this appears to be very doubtful ¹. This decision was followed in the case of *Whitfield v. Lord Le Despencer*, 1778; Cowp. 754, decided by Lord *Mansfield*, C J., and the Court of King's Bench. And in *Mersey Docks Trustees v Gibbs*, L R 1 H. L., at p. 124; 35 L. J. Ex 225; 145 R. R 385, Lord *Wensleydale* states the well-settled principle of law to be that when a person is acting as a public officer on behalf of Government, and has the management of some branch of the Government business, he is not responsible for the neglect or misconduct of servants, though appointed by himself; the subordinates are the servants of the public, not of the head of the department.

If a public officer himself abuses his trust either by an act of omission or commission amounting to a positive breach of his duty,

¹ See Cowp., at p. 759

and thus causes an injury to an individual, an action may be maintained against him *Henley v Mayor, etc of Lyme*, 5 Bing., at p 107; 37 R. R. 125; *Robinson v Gell*, 12 C. B. 191; 21 L. J. C. P. 155. See the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), which, however, only applies where the officer has acted in supposed pursuance and with a *bona fide* intention of discharging his duty, although in fact he may have acted illegally. see *Theobald v. Crichmore*, 1 B. & Ald. 227, 19 R. R. 297.

In the case of trespass by an inferior official acting directly under the orders of his superior, who has substantially directed the act complained of to be done, both officials may be sued. If it cannot, however, be shown that the superior directed the trespass, then the person actually committing it is alone liable *Raleigh v Goschen*, [1898] 1 Ch. 73, 77 L. T. 429, 46 W. R. 90, 67 L. J. Ch. 59.

In *The Mogileff* (No. 2), [1922] P. 122, 91 L. J. P. 72, under a writ of *fi fa* taken out by the plaintiffs, the Sheriff of Lincoln seized two ships, alleged to be the property of their debtors, the Russian Volunteer Fleet. The Board of Trade gave notice to the sheriff that the ships were the property of His Majesty. The sheriff thereupon took out an interpleader summons directed to the plaintiffs and to His Majesty represented by the Shipping Controller. It was held by *Hall, J.*, and the Court of Appeal, following *Candy v Maugham* (1843), 6 Man. & G. 710; 13 L. J. C. P. 17, that on the broad principle that the King could not be made to submit to the jurisdiction of the King's Courts against his will, the Court could not order an interpleader issue. "In my view," said *Scrutton, L. J.*, "the interpleader rules, which have the force of statutes, do not bind the Crown. The principle, I think, is that statutes do not bind the Crown in any case where they would affect any existing prerogative or interest of the Crown, unless either express words or necessary implication compel the Court to come to that view." He added: "I felt that the result of the action taken by the Crown in this case is to delay justice to a British subject." This case was followed in *Hulton v H. M.'s Secretary of State for War Department* (1926), 43 T. L. R. 106, upon motion to restrain the Secretary of State from taking proceedings for compulsory purchase of land and from trespass. *Tomlin, J.*, following also *Raleigh v Goschen*, [1898] 1 Ch. 73; 67 L. J. Ch. 59, held that no action would lie against the Secretary of State in his official capacity, although he could be sued as an individual.

Viscount Canterbury v. Att.-Gen.

1 *Phillips*, 306; 12 *L. J. Ch.* 381; 7 *Jur.* 224. (1842.)

Case.] This was a petition of right, in which the petitioner claimed compensation from the Crown for damage done to his property while Speaker of the House of Commons by the fire which in 1834 destroyed the Houses of Parliament. The fire had been caused, the petitioner alleged, by the negligence of the servants of the Crown, in burning a large quantity of the old tallies from the Exchequer in so careless a manner as to overheat certain stoves. To the petition the Attorney-General put in a general demurrer. The argument turned on the meaning of the maxim, "The King can do no wrong," which, it was maintained, covered civil torts as well as criminal acts.

The other side argued that no construction could be right which would enable the King to wrong the subject without making compensation, for the prerogatives exist for the advantage of the people. It was admitted, indeed, that for the personal negligence of the Sovereign, no proceedings could have been maintained.

Lord *Lyndhurst*, C., allowed the demurrer.

Held —That a petition of right does not lie to recover compensation from the Crown for damage due to the negligence of the servants of the Crown.

Rogers v. Dutt.

18 *Moo. P. C. C.* 209. (1860.)

Case.] This was an action for damages against Rogers, superintendent of marine in the service of the East India Company, by Dutt, the owner of the steam tug *Underwriter*. Rogers was charged with wrongfully issuing an order as superintendent forbidding the officers of the Bengal pilot service to allow the *Underwriter* to take any ship in tow of

which they had charge. There was no evidence of malice against Rogers.

Judgment.—In delivering the opinion of the Judicial Committee, Dr. *Lushington* held that no action lay against the appellant Rogers in his official capacity. But if the act was in itself wrongful, and injured Dutt, he must have the same remedy by action against the doer, whether the act was his own, spontaneous and unauthorised, or whether it was done by order of the superior power. “The civil irresponsibility of the supreme power for tortious acts could not be maintained with any show of justice if its agents were not personally responsible for them; in such cases the Government is morally bound to indemnify its agent, and it is hard on such agent when this obligation is not satisfied; but the right to compensation in the party injured is paramount to this consideration.”

Note—Thus actions of trespass will not lie against officials of the Crown or a department of the Government when sued in their official capacity or as an official body, but will lie against officials in respect of acts done or directed by them, if sued individually, even though the acts are done by the express authority of the Government.

Tobin v. The Queen.

33 *L. J. C. P.* 199; 16 *C. B.* (N.S.) 310; 10 *L. T.* 762. (1864.)

Case.] The captain of one of Her Majesty's ships had taken and destroyed an innocent vessel, assumed by him engaged in the slave trade. The owners brought a petition of right against the Crown to recover damages. The Attorney-General demurred on the ground that the petition of right did not show that the Crown was in law responsible for any of the alleged unlawful acts of Captain Douglas.

Judgment—“The maxim that the King can do no wrong,” said *Erle*, C J., “is true, in the sense that he is not liable to be sued civilly or criminally for a supposed wrong. That which the Sovereign does personally, the law presumes will not be wrong. That which the Sovereign does by com-

mand to his servants cannot be wrong in the Sovereign, because, if the command is unlawful, it is in law no command and the servant is responsible for the unlawful act; the same as if there had been no command . . . This maxim has been constantly recognised, and the notion of making the King responsible in damages for a supposed wrong tends to consequences that are clearly inconsistent with the duty of the Sovereign ”

Held—(1) That in seizing the ship Captain Douglas was not acting in obedience to a command of Her Majesty, but in the supposed performance of a duty imposed upon him by an Act of Parliament, *viz.* the Act for the Suppression of the Slave Trade. (2) That even assuming that he was an agent employed by the Queen to seize vessels engaged in the slave trade he was not acting within the scope of his authority in seizing a ship not so engaged, and therefore could not make his principal liable (3) That a petition of right cannot be maintained against the Crown to recover damages for a trespass.

Note.—The words of the judgment show that an action might lie against Captain Douglas, as having exceeded his authority Compare *Madrazo v Willes*; *Buron v Denman*, p 140, and the note on the “Liability of Officers” (p 147). The judgment in this case was approved by the Court of Queen’s Bench, in *Feather v The Queen*,¹ 1865, where it was held that a petition of right does not lie to recover damages for an infringement of patent rights by the Crown In *Thomas v The Queen*,² 1874, it was decided that a petition of right lies to recover unliquidated damages for the breach of a *contract* made on behalf of the Crown by a duly authorised agent

Grant v. Secretary of State for India.

46 L. J. C. P. 681; 2 C. P. D. 445. (1877.)

Case.] This was a claim for damages by the plaintiff for wrongful dismissal from employment in the East India

¹ 35 L J Q B. 200, 12 L T 114, 6 B & S 257. 141 R R 405

² L. R. 10 Q B 31, 44 L J Q B 9

Service and for libel. The defendant pleaded that the orders made and the acts done by him were made and done by him as, the Executive Government on behalf of Her Majesty affecting the plaintiff in his capacity of an officer holding a commission in Her Majesty's Indian military forces.

Held —That there was no cause of action, since the Crown, acting by the defendant, had a general power of dismissing a military officer at its will and pleasure and that the defendant could make no contract with a military officer in derogation of such powers. Publication of the dismissal in the *Gazette* was an official act under the authority of the Crown, for which the defendant could not be made responsible in an action for libel.

Bainbridge and another v. Postmaster-General and Crane.

[1906] 1 K. B. 178; 75 L. J. K. B. 366.

Case.] This was an action by John Bainbridge for damages for loss of services and wages owing to the personal injuries to the other plaintiff, his daughter, and by the said daughter for personal injuries sustained by her through an accident arising out of the negligence of Crane, a subordinate officer of the Post Office, in dealing with the laying of an electric wire. The action against the Postmaster-General was in his corporate capacity under the Telegraph Act, 1863,³ and the Electric Telegraphs Act, 1868.⁴ By section 42 of the former Act the Telegraph Company was liable for all accidents, damages and injuries caused by the act or default of the company or of any person in their employment. By section 2 of the Act of 1868, the former Act was incorporated with it and the Postmaster-General was substituted for the company. Was the Postmaster-General liable in his official capacity for the negligence of his officer?

³ 26 & 27 Vict. c. 112.

⁴ 31 & 32 Vict. c. 110.

Judgment.—Relying upon the principles laid down in *Lane v. Cotton*, p. 75, and *Whitfield v. Lord Le Despencer*, 4 Cowp. 754, the Court found that he was only liable for his own personal default. The Postmaster-General is not like a common carrier or employer, liable for the default of his servants. The co-defendant Crane was not in the employment of the Postmaster-General. He was a subordinate officer of the Crown. The *nexus*, therefore, between the Postmaster-General and Crane was broken.

Held —That the Postmaster-General is not liable in his official capacity, as head of the telegraph department of the Post Office, for wrongful acts done by his subordinates in carrying on the business of the department.

Note —See *Macgregor v. Lord Advocate*, [1921] S C 847, where it was held that an action for personal injuries did not lie against the War Department to recover damages caused by a collision with a car belonging to the Department, and driven by its servant

NOTE IV.—REMEDIES AGAINST THE CROWN.

The ordinary modes of action are not available against the King, this is a practical corollary from the maxim that the King can do no wrong. It has, however, been doubted whether this has always been the case, although no example of an ordinary action against the reigning Sovereign can be found.

But although a subject could not bring an action against the Crown in respect of any contract, tort or crime, he was entitled to petition the King in respect of certain rights illegally invaded by the Crown. The Petition of Right belonged to that general class of petitions which were presented to the King, the Council or Parliament during the Middle Ages, and which emerged as Ordinances, Decrees or Statutes. Some of those presented to the King asked for some grace or favour. Petitions of right belong to this last group, which again is sub-divided into two groups—Those in which the petitioner asks for something to which he would have a legal claim against a fellow-subject, and those in which he asks for something to which he would have no legal claim, *e.g.*, a petition for some office. The procedure in a petition of right in the former was cumbrous, dilatory and consequently expensive. When the petition had been indorsed "Let right be done," a special commission of inquiry was appointed by the Chancery to ascertain the facts. The commission's finding was generally found to involve some question of law, which was heard on the common law side of the Court of Chancery, or sent to the Court of King's Bench.

Again, if the title of a grantee of the King was involved, it was necessary to summon such grantee to attend and plead. Sometimes it was found necessary to appoint a second commission to ascertain further and better particulars, and then to present another petition to order the case to be sent for trial. Then, too, the King might delay matters by instituting a search in the records to support his title. Further, the King had other advantages in pleading. This dilatory procedure lasted till 1860, but it gave rise to other remedies against the Crown. One such arose in this way. Upon the death of a tenant, or upon the lunacy of any person, an inquest was held and the King seized the property and was said to be entitled by office found. But the King might not be entitled, and so by 34 Edw. 3, c. 14, the aggrieved party

was allowed to traverse the facts found by the inquest of office. And by 36 Edw 3, c. 13, the aggrieved party might call upon the escheator to send the inquest to Chancery to be heard, which became known as the writ of *monstrans de droit*. In the Middle Ages the law of property covered a wider field than in modern times: the modern distinction between contract and tort had hardly arisen. With the abolition of military tenures in 1660, the old real actions fell into disuse and people turned once more to the remedy of the petition of right. But as the remedy became more and more restricted, it was correspondingly less resorted to, until by the Petitions of Right Act, 1860 (23 & 24 Vict c 34), the procedure was simplified. If the petition of right be indorsed generally, it goes to the Chancery Division of the High Court, but it may be indorsed in either the Chancery or King's Bench Division, or, if it relates to naval prize, in the Probate, Divorce and Admiralty Division. Before the petition can be set down for hearing, the *fiat* of the Attorney-General must be obtained, the petition being lodged at the Home Office for this purpose. Although the grant of a *fiat* is an act of grace, the Crown or its responsible advisers cannot refuse capriciously to investigate any proper question raised in a petition of right. *Ryves v Duke of Wellington* (1846), 9 Beav. 579; 15 L J Ch 461. But if the *fiat* is refused the proceedings cannot continue, and an action will not lie against a Minister for advising the Sovereign to refuse the *fiat*. *Irwin v Grey*, 3 F. & F. 635; 135 R. R. 934. When the *fiat* is granted the subsequent proceedings follow the course of ordinary actions as far as possible. By section 7 of the Act, the Court has a discretion in deciding whether the trial shall be by a Judge alone or by a Judge and jury. *Re Marconi's Telegraph Co's Petition*, [1918] 1 K. B 195; 87 L. J. K B 242.

If the subject were injured by a *grant* by the Crown made to other parties, the remedy was formerly by a writ of *scire facias*, but it would appear from section 5 of the Petitions of Right Act, 1860, that any injustice so done may now be remedied under a petition of right, a copy of which is to be served on the grantees.

In cases where it has been alleged that executive officers of the Crown have failed to perform their duties and have thus occasioned damage to members of the public, attempts have not unfrequently been made to induce the High Court of Justice to enforce the performance of those duties by the issue of a writ of *mandamus*. Occasionally, no doubt, such writs have been issued, but it appears now to be well settled that, although in cases where servants of the Crown have been constituted by statute agents to do particular acts a *mandamus* will lie against them as individuals designated to do those acts, yet where

they are acting merely as servants of the Crown, and owe no legal duty to the applicant, he cannot ask for a mandamus to compel them to do their duty to the Sovereign their employer. So in *The Queen v The Lords Commissioners of the Treasury*¹ the Court refused a mandamus to compel the defendants to pay the costs of certain prosecutions out of moneys granted and appropriated by Parliament and applicable to that purpose, *Cockburn*, C J, in his judgment observing "Independently of authority, I think there is no doubt whatever that we must look upon them (*i.e.* the Lords of the Treasury) as servants of the Crown. The money is voted by Parliament as a supply to the Crown.

. It is true that the money is appropriated to a specific purpose, and it is true that the money can only be appropriated to the purpose so specified in the Appropriation Acts. It is also true that . . . it is a supply to be got at by a certain specified process, and it is true that the Crown must issue warrants or orders under the sign manual to enable the Lords Commissioners of the Treasury to have this money paid to them. But, nevertheless, when the money is paid, I can entertain no doubt that it is paid to the Lords of the Treasury as servants of the Crown." In such cases the remedy, if there be one at all, is by petition of right. It is not, however, unusual where a legal question arises, for the advisers of the Crown to waive the objection to the jurisdiction to grant a mandamus in order that the opinion of the Court may speedily be obtained.²

By section 37 of the Crown Suits Act, 1881, if wrong or damage independent of contract is done or suffered by or under lawful authority of the Governor on behalf of H M or of H.M.'s Executive Government in the colony, in, upon, or in connection with a public work, such as a railway, tramway, road, bridge, electric telegraph or other work of a like nature, used by the Government of the colony or constructed by the Government out of moneys appropriated by the General Assembly and its revenues, a petition of right lies in respect of such wrong or damage.

In *Reg v Williams* (1884), 9 App Cas 418; 53 L. J. P. C 64, the Executive Government possessed the control and management of a tidal harbour with authority to remove obstructions in it, and the public had a right to navigate therein subject to the harbour regulations and without payment of harbour dues, and to use the staiths and wharfs belonging to the Executive Government, for which dues were to be paid.

¹ L R 7 Q B 387, 41 L J Q B 178; 26 L T 64; 20 W. R 336; see also *R v Secretary of State for War*, [1891] 2 Q B, at p. 334, 60 L J. Q B 457, 64 L T 764, 40 W. R 5

² *As, e.g.*, in *R v Commissioners of Inland Revenue*, [1891] 1 Q. B., at p 488, 60 L J Q B 376; 64 L. T 57, 39 W R 317.

Here a vessel was injured by a snag which the Government had for years negligently suffered to exist

Held —A duty was imposed on the Executive Government to take reasonable care that vessels using the straits in the ordinary way might do so without damage

The disapprobation with which the public has viewed the privileged position of the Crown as a litigant culminated in the appointment of the Crown Proceedings Committee in 1921. In accordance with its terms of reference the Committee has drafted a Bill "to assimilate the procedure in the High Court to the procedure in actions between subjects, to authorise certain proceedings to be brought in the County Courts, to make the Crown liable to be sued in tort, to amend the law with respect to limitation of liability and salvage in the case of Crown ships and to make other provision with respect to the enforcement of rights by or against the Crown," including such matters as discovery, the receiving and paying of costs by the Crown upon the same footing as far as possible as in suits between subjects ¹. There appears to be no immediate prospect of this measure becoming law.

¹ Parl. Pap. 1927 [Cmd 2842]

ACTIONS AGAINST CORPORATIONS AND DEPARTMENTS.

In some cases Government officials or Departments of State have been invested with the attributes of a corporation, and, consequently, even where liability to be sued has not been expressly made, they may be sued in their corporate capacity, either in contract or tort, in the ordinary form, *e.g.*, the Commissioners of Works and Buildings were held liable to be sued in respect of land compulsorily purchased under the Lands Clauses Acts: *Re Wood's Estate* (1886), 31 Ch. D. 607, 55 L J Ch. 488. In *Graham v Commissioners of Public Works*, [1901] 2 K. B. 781; 70 L. J. K. B. 860, it was held that an action lay against H.M. Commissioners, who were incorporated by statute, for damages for breach of a contract entered into by them with the plaintiffs for the erection of a public building. *Held*, also, by *Ridley, J.*, that they did not contract as agents of the Crown, but in their own capacity. They expressly contracted for themselves.

Phallimore, J., was of the same opinion, but preferred to put his judgment on other grounds.

“The Crown cannot be sued; thus, neither can the subject take action indirectly against the Crown by suing a servant of the Crown upon a contract by the servant as agent for the Crown. A Crown servant making a contract for the Crown is no more liable than any other agent making a contract for his principal. But for the facilitating the conduct of the business it is extremely convenient that the Crown should establish officials or corporations who can speedily sue and be sued in respect of business engagements without the formalities of the procedure necessary when a subject is seeking redress from his Sovereign.”

“For that purpose the Crown has with the consent of Parliament established certain officials who are to be treated as agents of the Crown, but with a power of contracting as principals. The Secretary of State for War and the Postmaster-General are instances of this, and, apparently, the Commissioners of Woods and Forests. Also Commissioners of Works and Public Buildings for certain purposes are liable to be sued. So under the Merchant Shipping Act, the President of the Board of Trade may be sued for the tort, *e.g.*, of some official at a seaport: *Dixon v Farrer*, 18 Q B D 43; 56 L J Q B 53. The Commissioners in this case are liable, but no execution could be levied, because their property is Crown property—the judgment against them would have to be satisfied, if at all, out of moneys provided by Parliament.” The judgment, therefore, is only declaratory.

The decision in *Graham's Case* was followed by *Shearman, J.*, in *Roper v. Commissioners of Works and Public Buildings*, [1915] 1 K B. 45; 84 L. J. K. B. 219, and by *Bankes, L.J.*, in *Commissioners of Works and Public Buildings v. Pontypridd Masonic Hall Co., Ltd.*, [1920] 2 K. B. 233; 89 L. J. K. B. 607, where he said that if a body, whether incorporated or not, is in fact acting in any particular manner as agents of the Crown, they are to be treated in law as such agents and the Statute of Limitations does not apply.

By 1 & 2 Geo. 4, c. 93, s. 9, the principal officers and commissioners of the Navy were empowered to bring any action of ejectment or other proceedings for recovering possession of land sites, and to defend any action in respect of such lands. These powers were vested by subsequent statutes in the Commissioners of the Admiralty. The Commissioners are not a corporation, and consequently a writ must be served on each: *Williams v. The Admiralty* (1851), 11 C. B. 420; 20 L. J. C. P. 245.

Raleigh v. Goschen, [1898] 1 Ch. 73; 67 L J Ch. 59, was an action against Goschen and the Lords Commissioners of the Admiralty and Major E. Raban, Director-General of

Naval Works, with the object of establishing against them that they were not entitled to enter upon or acquire by way of compulsory purchase certain property and claiming damages for trespass

Held, that though the plaintiff could sue any of the defendants individually for trespasses committed or threatened by them, he could not sue them as an official body and that as the action was a claim against the defendants in their official capacity it was misconceived and would not lie

And *Romer, J.*, said the rights of the plaintiff would not of necessity be confined to an action against those actually committing the trespass, who might be very humble persons. If a trespass were committed by those persons by the order or direction of some higher officials, so as in substance to have been the act of those higher officials, then the latter could be sued. For example, suppose the captain of a ship to have unlawfully ordered some sailors to take possession of a house and they obeyed his order, he could be sued for the trespass, even though he himself remained on board his ship and did not personally enter the house.

So, too, Trinity House being incorporated under the Merchant Shipping Act, 1854, are not servants of the Crown so as to be exempt from an action for negligence—see *Gilbert v. Trinity House Corporation* (1886), 17 Q. B. D. 795; 56 L. J. Q. B. 85, where a beacon vested in the Corporation was ordered by them to be removed. Their contractor had negligently left an iron stump sticking up under water whereby the plaintiff's ship was injured

Held liable for the contractor's negligence.

The Board of Trade has no general power to sue and is not liable to be sued. But powers to take proceedings for various purposes have been conferred by a number of statutes, *e.g.*, in bankruptcy, shipping, and navigation.

The Board of Education may sue and be sued in the name of the Board. So, too, the Ministry of Health and the Ministry of Transport. By section 26 of the Ministry of

Transport Act, the Minister of Transport may sue and be sued in respect of matters relating to contracts, torts or otherwise, arising out of his office. He is responsible for the acts and defaults of his officers, servants or agents, and costs may be awarded to or against the Minister. For the purpose of acquiring and holding land the Minister is a corporation sole.

By section 10 of the Air Force (Constitution) Act, 1917 (7 & 8 Geo. 5, c. 51) it is provided that "The Air Council may sue and be sued and may for all purposes be described by that name." It was held by *Russell, J.*, in *Rowland v. The Air Council* (1923), 39 T. L. R. 228, that this provision does not derogate from the principle that no action will lie on a contract made on behalf of the Crown by a servant of the Crown. The provision was couched in general terms, and the words were very different from those in section 26 of the Ministry of Transport Act. It could not be construed so as to include the right to proceed by writ against the Department to enforce any cause of action.

And in *Chare v. Hart* (1919), 88 L. J. K. B. 833, it was held by the Divisional Court, applying the *dictum* of *Wills, J.*, in *Cooper v. Hawkins*, [1904] 2 K. B. 164; 73 L. J. K. B. 113, that the Crown is not bound by a statute unless expressly named or unless it so appears by necessary implication. This applies to a servant of the Crown when acting within the scope of his authority.

In *Denning v. Secretary of State for India* (1920), 37 T. L. R. 138, the plaintiff was engaged for five years certain as a civil servant of the Crown, subject to dismissal for misconduct. After three years' service he was dismissed on grounds of health. Following the decisions in *Dunn v. The Queen*, [1896] 1 Q. B. 116; 65 L. J. Q. B. 279, and *Gould v. Stuart*, [1896] A. C. 575; 65 L. J. P. C. 82, *Bailhache, J.*, held that a Crown servant against whom no misconduct is alleged is liable to dismissal at the pleasure of the Crown without notice, even if the form of agreement under which he

is engaged implies that except for misconduct the engagement can be terminated only by notice.

But all Ministers and public servants can be sued and made personally liable for tortious acts committed by them in their official capacity, without proof of malice or want of probable and reasonable cause

They are, of course, liable for criminal acts

In *R. v Hall*, [1891] 1 Q. B 747; 60 L. J. M. C. 124, an overseer was indicted for unlawfully, wilfully, maliciously, knowingly and corruptly omitting from the list of voters the name of one Stanley Mockett.

It was laid down that an offender against a statute for the liberty and security of the subject or for a matter of public convenience may be sued by the party aggrieved or indicted for contempt of the statute. In *R. v Watson* (1788), 2 T. R. 199; 1 R. R. 461, where there was no statute, a criminal information for libel was granted against the members of a corporation for an order made by the corporation and entered in their books, which they knew to be a libel.

LIABILITY OF GOVERNORS AND VICEROYS.

Mostyn v. Fabrigas.

Cowp. 161; 1 *Smith*, L. C. 591. (1774.)

Case.] This was an action in the Common Pleas against the Governor of the island of Minorca for illegally imprisoning and banishing the plaintiff without trial, on the ground that the plaintiff was concerned in an alleged riot. The acts complained of were committed in Minorca but the declaration formally alleged that they were committed in London, where the venue was laid. The defendant pleaded "not guilty," and a special plea alleging that he was Governor of the island, that the plaintiff was raising a sedition and mutiny, and that in consequence thereof he caused him to be imprisoned there, which as Governor he had a right to do. The plaintiff took issue upon these pleas, and the jury found in his favour with £3,000 damages.

The case was argued on error in the King's Bench, principally on the ground for the defendant, that no action would lie in England for an act committed in Minorca upon a native of that island.

Judgment.—Lord *Mansfield*, C.J. It is impossible there could ever exist a doubt but that a subject born in Minorca has as good a right to appeal to the King's Courts of Justice as one who is born within the sound of Bow bells. To repel the jurisdiction of the King's Court you must show another jurisdiction; but here no other is even suggested. The effect or extent of the King's letters patent which gave the Governor his authority can only be tried in the King's Courts, ~~so that~~

a Governor must be tried in England, to see whether he has exercised the authority delegated to him legally and properly.

An action lies against a Governor in the Courts of this country for injuries committed by him in the possession of which he is Governor.

Note—It was also argued for the defendant that no action would lie against him as Governor acting in a judicial capacity. To this Lord *Mansfield* assented, but pointed out that it had not been pleaded, nor was it even in evidence, that the defendant sat as Judge of a Court of justice. It may be noted that Minorca was a British possession from 1763 to 1782.

Hill v. Bigge.

50 *R. R.* 68; 3 *Moo. P. C. C.* 465. (1841.)

Case.] An action had been brought against the Governor of the island of Trinidad, Sir George Hill, in the Court of Civil Jurisdiction there, for a debt incurred in England to English creditors, and before his appointment as Governor. He appeared under protest, and pleaded that he could not be sued in the Court of a colony of which he was the Governor. The plea was overruled, and the case decided against him.

He now appealed to the Privy Council, and it was argued that he, being by the terms of his commission vested with legislative as well as executive power, was not within the jurisdiction of the Courts in the colony he governed.

In the judgment (delivered by Lord *Brougham*) the judgment of the colonial Court was affirmed, and it was pointed out that (1) the authority of a Governor is only delegated from the Sovereign, and is strictly limited by the terms of his commission; (2) the Crown itself may be sued, though in a particular manner; (3) the Judges of the Courts in this country are liable to be sued in their own Courts.

Held—That an action will lie against the Governor in the Court of his colony.

Phillips v. Eyre.

L. R. 4 *Q. B.* 225; 6 *Q. B.* 1; 40 *L. J. Q. B.* 28; 22 *L. T.* 869;
10 *B. & S.* 1004. (1867.)

Case.] This was an action of assault and imprisonment against the defendant, who was Governor of Jamaica, and upon the outbreak of a rebellion there had proclaimed martial law, and taken various measures for the suppression of the rebellion, in the course of which the acts were committed for which the action was now brought.

The defendant in one of his pleas alleged that the grievances complained of were covered by an Act of Indemnity which had been passed in 1866 by the Jamaica Legislature and that the action therefore could not be maintained

To this the plaintiff replied that the defendant was still Governor at the passing of the Act of Indemnity, which could, therefore, only have become law by his consent. It was also urged in argument that an Act of the Jamaica Legislature could not bar the plaintiff's right to maintain an action in England.

The defendant demurred, and the demurrer was heard in the Queen's Bench, and then upon error in the Exchequer Chamber, where judgment was delivered for the defendant by *Willes, J.*

Held :—(1) That the Governor of a colony can legally give his consent to a Bill in which he is personally interested; (2) that the Act of a colonial Legislature must be treated in accordance with the principles of the comity of nations, that consequently where by the colonial law an act complained of is lawful, such act, though it would have been wrongful if committed here, cannot be made the ground of an action in an English Court, and that the same reasoning applies where an act is afterwards legalised by a colonial statute (see on this last point the judgment of *Cockburn, C.J.*, in the Queen's Bench).

Musgrave v. Pulido.

5 *App. Cas.* 102; 49 *L. J. P. C.* 20; 41 *L. T.* 629. (1880.)

Case.] This was an appeal to the Privy Council from the Supreme Court at Jamaica. The plaintiff in the action had there sued the defendant for a trespass, in seizing and detaining a schooner of which the plaintiff was charterer

The defendant pleaded that he was Governor of the island, and entitled to the privileges of that office, and that the acts complained of were done by him as Governor and, in the exercise of his discretion, as acts of State. The Supreme Court overruled the plea, and ordered the defendant to answer further, and the defendant appealed

It was contended for the appellant that the plea was good as a plea of privilege, and that it also disclosed a good defence to the action.

Judgment was delivered by Sir *Montague Smith* affirming the decision of the Court below, in the course of which he said: "Let it be granted that, for acts of power done by a Governor under and within the limits of his commission, he is protected, because in doing them he is the servant of the Crown and is exercising its sovereign authority; the like protection cannot be extended to acts which are wholly beyond the authority confided to him. Such acts, though the Governor may assume to do them as Governor, cannot be considered as done on behalf of the Crown, nor to be in any sense acts of State."

Held:—(1) That a Governor is not privileged from being sued in the Courts of his colony; (2) that it is within the province of municipal Courts to determine whether any act of power done by a Governor is within the limits of his authority, and therefore an act of State.

Luby v. Lord Wodehouse.17 *Ir. C. L. R.* 618—640. (1865.)

Case.] The plaintiff was the proprietor of the *Irish People* newspaper, and had been himself arrested, and his office had been broken into, and his working plant, books, and papers had been carried away and detained by the police. He brought an action against the Lord Lieutenant in the Irish Court of Common Pleas in trespass, trover, and detinue. The Lord Lieutenant did not appear and defend the action, but the Attorney-General applied for an order to stay all proceedings, upon the ground (*inter alia*) that the acts complained of were done by the defendant in his capacity as Lord Lieutenant of Ireland.

Held —That no action is maintainable against the Lord Lieutenant of Ireland during his continuance in office for any act done by him in his capacity of Lord Lieutenant.

Where such an action has been brought, the Court will on motion direct the writ of summons and plaint to be taken off the file without putting the Lord Lieutenant to plead to the jurisdiction.

That the question as to whether or not the act was done by the defendant in his capacity of Lord Lieutenant is not a proper one to be submitted to a jury.

NOTE V.—THE LIABILITY OF GOVERNORS AND VICEROYS.

It is now well settled that a colonial Governor may be sued not only in this country but in the Courts of his colony during his governorship. Some degree of doubt as to his liability was caused by an erroneous theory expressed by Lord Mansfield in *Mostyn v Fabrigas*, 'that the governor is in the nature of a viceroy, and that therefore locally, during his government, no civil or criminal action will lie against him.' This doubt was disposed of, however, by the cases of *Hill v Bigge* and *Musgrave v Pulido*, and it is now well established that a Governor's authority is expressly limited to the terms of his commission, and that he does not possess general sovereign power. There is one important qualification of his liability. He cannot be held responsible in any action for any act done by him as an *act of State* and within his legal authority. And *Musgrave v Pulido* shows that it is within the province of the Courts to determine whether acts alleged to be acts of State are really so.

The Lord Lieutenant of Ireland and probably the Governor-General of India, neither of which countries was a colony, stood, indeed, upon a different footing, and were considered to be viceroys. It has been held that no proceedings in respect of an *act of State* could be even commenced against the Lord Lieutenant of Ireland, as is shown by *Luby v Wodehouse*, and also by *Tandy v Earl of Westmoreland*, 27 St Tr. 1246, and *Sullivan v. Earl Spencer*, Ir Rep 6 C L. 173. It was indeed admitted in *Luby v Lord Wodehouse* (at pp 627, 631) that actions had been brought against a Lord Lieutenant for debt in the High Courts, and that he would be liable for every personal injury or debt.

A Governor, like other public officers, is not personally liable on contracts made by him in his official capacity (*ante*, p. 92), and, in all cases where his actions are of a judicial nature, he shares of course in the immunity of all Judges.

The criminal liability of a Governor is expressly provided for, at any rate in respect of misdemeanours, by 11 & 12 Will 3, c 12, and 42 Geo 3, c. 85, which enact that all crimes committed by Governors of colonies and others in the public service in places beyond seas shall

be tried in the Court of King's Bench. In *R v Eyre*,¹ it was decided that under these statutes and 11 & 12 Vict c 42, s 2, in the case of a misdemeanour alleged to have been committed by an ex-Governor in his colony, a magistrate within whose jurisdiction the accused had come had jurisdiction to hear the case, and if he should commit on the charge, he must return the depositions into the King's Bench, and it has since been held that the above-mentioned statutes apply only to misdemeanours and not to felonies.²

Ex-Governor Wall³ was tried in 1802 for murder, on the ground of his having inflicted excessive corporal punishment in the island of Goree in 1782. He was convicted and hanged, Lord Campbell thinks, "through vengeful enthusiasm."⁴

In 1804 General Picton⁵ was tried in the King's Bench for a misdemeanour in causing torture to be inflicted upon Luisa Calderon to compel a confession while he was Governor of Trinidad. A question arose as to whether the Spanish law permitted torture in Trinidad at the time of its cession by Spain. A rule for a new trial having been obtained, upon the second trial the jury returned a special verdict setting forth the facts, and the Court ordered the defendant's recognisances to be respited till further orders. No judgment had been pronounced when General Picton fell at Waterloo.

For an earlier discussion of the various questions as to a Governor's liability, *Dutton* app, v. *Howell* resp, 1690, in the House of Lords may be consulted.⁶

¹ L. R 3 Q B 487, 37 L J M C 159

² *R. v Shawe*, 5 M & S 403; 17 R R 370

³ *R v Wall*, 28 St Tr 51.

⁴ Campb, *Lives of the Chief Justices*, vol 3, p 149, Forsyth Cas & Opin. 86

⁵ *R v Picton*, 30 St Tr 225

⁶ Shower, *Cases in Parliament*, 24. For other cases on the powers, duties, and liabilities of governors see Forsyth, pp 80—89

LIBERTY OF THE SUBJECT—HABEAS CORPUS.

Darnel's Case (Five Knights' Case).

3 St Tr. 1. (1627.)

Case.] It was the forced loan of 1626 which raised the question of the power of the King to detain in confinement without cause shown, and which resulted in the Petition of Right. Amongst those arrested for refusal to pay were five knights. Darnel, Corbett, Earl, Heveningham, and Hampden, who applied to the Court of King's Bench for writs of *habeas corpus* directed to the Warden of the Fleet to show the cause of the imprisonment, that thereupon the Court might determine whether the imprisonment was legal or illegal. The writs were granted, and the Warden made a return alleging that the prisoners were in his custody by virtue of a warrant of the Privy Council, which stated that the prisoners "were committed with no particular cause of commitment, but by special command of His Majesty."

Counsel for the prisoners boldly contended that their imprisonment was wholly illegal. By Magna Carta no man may be imprisoned "except by the lawful judgment of his peers or by the law of the land." An examination by the Privy Council was not a legal trial, and if it could imprison without showing cause, prisoners might be condemned to perpetual imprisonment. This point was taken up by the Court, and Heath, Attorney-General, was directed to meet it. This, of course, he was unable to do. He only succeeded in showing that in certain cases of deep-laid conspiracies against the State, the Privy Council required time in which to prepare the case for trial. He argued from the maxim, "The King can do no wrong," that a cause must be presumed to exist for

the commitment, though it be not set forth. This argument was adopted by the Court.

Judgment.—The Court thereupon decided that where an *insufficient* cause of commitment was expressed, the prisoner should be delivered if the case so required, but where *no* cause was expressed the prisoner had ever been remanded. Bail was therefore refused.

Note—Mr. Justice *Whitelocke's* explanation of the decision was that in view of the King's special command to them that there was good cause for the commitment, the Court ought to exercise its discretion by refusing bail, unless it appeared that the Crown intended to persist in refusing to show cause and thus to inflict perpetual imprisonment.

On January 2, 1628, the resisters, some ninety-six in all, were released, and on the 30th Charles reluctantly summoned Parliament, which met on March 17. On the 21st Sir Edward Coke brought in his Bill providing that no person should be detained in prison untried for more than three months, and on the following day commenced the great debate on the liberty of the subject. The King's supporters talked about a law of State and the Divine Right of Kings, to which the popular party replied that they knew of no law save the common law, which was the law of the land. Moreover, even under the law of the Chancery, of Ecclesiastical law, of the Admiralty, of the Law Merchant, and of the Law Martial, a man might not be committed without cause expressed. After long debate, and after the Lords had tried to knock the bottom out of the petition by a proviso reserving sovereign power to the King, Charles was forced, on June 7, to give the usual formal assent to the Petition of Right. Thus the second great landmark in our constitutional history, whereby the arbitrary power of the King was limited, was established, and we may note that it was the work of the lawyers of the four Inns of Court.

Nevertheless, in spite of the Petition and the Habeas Corpus Act of 1640, persons continued to be illegally detained. The imprisonment of Jenks in 1676 for a speech at the Guildhall brought matters once more to a head. The justices refused to bail him on the pretence that he had been committed by a superior Court, or to try him because he had not been entered in the calendar. The Lord Chancellor refused an application for a writ of *habeas corpus* because it was vacation, and the Chief Justice made so many difficulties that Jenks lay four or five months in prison; see 6 St. Tr. 1189. At last, after a long parlia-

mentary struggle, the Habeas Corpus Act, 1679, was passed, see *Introduction*

The repeal or suspension of the Habeas Corpus Acts would, as Dicey points out, deprive everyone in England of security against unlawful imprisonment, but would not deprive anyone of the right to a writ of *habeas corpus* at common law

It must be observed that the partial or total suspension of the Habeas Corpus Acts does not free any person from civil or criminal liability for a violation of the law. It has therefore been the almost invariable practice to pass an Act of Indemnity before the expiration of the statute depriving the subject of the rights under the Habeas Corpus Acts. But such an Act has never been held to afford protection to anyone, whether a servant of the Crown or not, for acts committed by them outside the purview of the statute, *mala fide* or without probable or reasonable cause

The constitutional practice would appear to be that Parliament may by express enactment suspend the operation of some or all of the provisions of the Habeas Corpus Acts for any period it pleases. This suspension has usually been for one year. But till the Defence of the Realm Act, 1914, Parliament had never attempted to effect such suspension by delegation to the Executive

Rex v. Halliday; Ex p. Zadig.

85 L. J. K. B. 953; 86 L. J. K. B. 1119; [1916] 1 K. B. 788;
[1917] A. C. 260.

Case.] The appellant Zadig was born in Germany of German parents in 1871, and became a naturalised British subject in 1905. In 1915 he was interned under an order of the Home Secretary under the provisions of Reg. 14B of the Defence of the Realm (Consolidation) Regulations, 1914, issued under the Defence of the Realm Act, 1914. This regulation empowered the Home Secretary to order the internment of any person where, on the recommendation of a competent naval or military authority or of an advisory committee, it appeared to him, in order to secure the public safety or the defence of the realm, expedient in view of *the hostile origin or associations* of such person. If such person was not a subject of a State at war with His Majesty, any appeal against the

order was to be considered by an advisory committee to be presided over by a person who held or had held high judicial office. Zadig contended that the regulation was *ultra vires*.

Judgment —It was held by the majority of the House of Lords that under the power conferred by the Defence of the Realm (Consolidation) Act upon the King in Council during the continuance of the war "to issue regulations for securing the public safety and the defence of the realm," that the Order made in accordance with Reg. 14B was valid. The measure, said Lord *Finlay*, C., was not punitive, it was precautionary. It had been contended by the appellant that (1) some limitation must be put upon the general words of the statute; (2) that there was no provision for imprisonment without trial; (3) that the provisions made by the Defence of the Realm Act for the trial of British subjects by a civil Court with a jury strengthened the contention of the appellant; (4) that general words in a statute could not take away the vested rights of the subject or alter the fundamental law of the Constitution; (5) that the statute was in its nature penal and must be strictly construed; and (6) that a construction said to be repugnant to the constitutional traditions of this country could not be adopted. Further, although the operation of the Habeas Corpus Acts had been suspended on several occasions, no general power had ever been given to the Executive to imprison on suspicion. He, Lord *Finlay*, was unable to accede to any of those arguments. It may be necessary in time of great public danger to entrust great power to His Majesty in Council, and Parliament may do so feeling certain that such power will be reasonably exercised. The object of the regulations was for preventive purposes. The restraint imposed may be a necessary measure of precaution, and in the interests of the whole nation it may be regarded as expedient that such an order should be made in suitable cases. That appeared to him to be the meaning of the statute. It was urged that if the Legislature had—

intended to interfere with personal liberty, it would, as on previous occasions, have provided for suspension of the rights of the subjects under the Habeas Corpus Acts. But the Legislature selected another way of achieving the same purposes, probably milder as well as more effectual than those adopted in previous wars. The application of the appellant had been rejected by the Divisional Court and by the Court of Appeal, and in his opinion the appeal ought to be dismissed. Lord *Dunedin*, Lord *Atkinson*, and Lord *Wrenbury* delivered judgments to the same effect, but Lord *Shaw*, in an elaborate and closely-reasoned judgment, strongly dissented. His judgment deserves careful examination.

Lord *Shaw* considered the question to be one of first-class importance, the judgment appealed from to be erroneous in law and constituting a suspension and breach of those fundamental constitutional rights which are protective of British liberty. He was clearly of opinion that Reg. 14B was *ultra vires*. Parliament never sanctioned, either in intention or by reason of the statutory words employed in the Defence of the Realm Act, such a violent exercise of arbitrary power. The regulation says that if a person in respect of whom any order is made fails to comply "he shall be guilty of an offence against the regulations." But the appellant has not committed any offence. No charge is made against him. If he had violated the regulations, he would have had his right to trial, but his case is hopeless, for he has been seized entirely apart from any offence or from anything that he has said or done or attempted. The Secretary of State's fiat has gone forth. It is one of proscription. And there is not in the statute a word about "hostile origin or associations," nor, indeed, about internments. It is not too much to say that so far as Parliament was concerned its intentions were directed anxiously to providing for the prompt and correct treatment according to law of the case of offenders against the regulations. Provision is carefully made by the statute for trial. An offence may, instead of being tried by court-martial, be

tried by a civil Court with a jury. The offender must be informed of the nature of the charge, but if he is interned under Reg 14b there is no charge: he cannot choose the form of trial; his rights are gone without trial. A "regulation" has gone forth against him. He has been "regulated" out of his liberty and out of every protection. The intention of Parliament was to give power to the Government to issue regulations—within the sphere and purpose of public safety and defence—prescribing a line of duty and course of action for the citizens so as to bring their private conduct into co-operation for that general end. This is what "regulation" means: it constitutes a code of conduct, in following the code the citizen will be safe; in violating it the citizen will become an offender and may be charged and tried summarily, or by a court-martial or a jury and as for a felony. This squares with all the rest of the legislation and destroys none of it. It sacrifices no constitutional principle; it introduces nothing of the nature of arbitrary condemnation or punishment; the Acts become a help and guide as well as a warning to the lieges. The form of using the Privy Council as the executive channel for the statutory power is measured, and must be measured strictly, by the ambit of the legislative pronouncement. And that channel itself is simply the Government of the day. The author of the power is Parliament; the wielder of it is the Government. Whether the Government has exceeded its statutory mandate is a question of *ultra* or *intra vires*. In so far as the mandate has been exceeded there lurk the elements of a transition to arbitrary government and therein grave constitutional and public danger.

Under this regulation the Government becomes a Committee of Public Safety. But its powers as such are far more arbitrary than those of the most famous Committee of Public Safety known to history. But the principle, so called, of prevention avoids the odium of the brutality of the Terror. The analogy is with a practice more silent, more sinister and

with the *lettres de cachet* of Louis Quatorze No trial: proscription The victim may be "regulated" not in his course of conduct or action, not as to what he should do or avoid doing He may be regulated to prison or the scaffold. If Parliament had intended to make this colossal delegation of power it would have done so plainly and courageously and not under cover of words about regulations for safety and defence. After referring to the provisions of Magna Carta, *Darnel's Case*, *Sprigg v. Sigcau* and the Scottish Act of 1701, Lord Shaw declared the regulation to be *ultra vires*.

Note—By the legal profession generally Lord Shaw's judgment was regarded as the more correct exposition of the law. Whether correct or not, it must be remembered that the Government was in a very difficult position A person might, in the opinion of the competent authority, be a danger to the State, and yet there might be no evidence sufficient to satisfy a jury Of the hundred or so persons interned under Reg 14B the majority were naturalised British subjects Very few were of British origin. Of those born in the United Kingdom nearly all were of German or Austrian origin. One was of uncertain origin.

But there is no doubt that many of the Regulations issued under the Defence of the Realm Acts were wholly illegal, and the Courts, by so declaring them, enhanced their reputation for impartiality and courage in withstanding the arbitrary actions of the Executive As was said at the time, what Dicey calls the essential characteristic of the British Constitution—viz "the absence of arbitrary power on the part of the Crown, of the Executive, and of every other authority in England"—went by the board, and the long-unused prerogative of Charles I and Strafford came to life with renewed vigour. For government by Parliament was substituted government by a small inner Cabinet, issuing its commands to Departments and to competent military authorities To understand the situation created some account of the Defence of the Realm Acts, known as "Dora," must be attempted

By the Defence of the Realm Act, No. 1, August 8, 1914, as amended by No 2, August 28, 1914, "His Majesty in Council has power to issue regulations as to the powers and duties of the Admiralty and Army Council, and of members of H.M. Forces and other persons acting in His behalf, for securing the public safety and the defence of the realm; and may by such regulations authorise the trial by courts-martial and punishment of persons contravening any of the provisions of such regulations designed—

- “(a) to prevent persons communicating with the enemy or obtaining information for that purpose or any purpose calculated to jeopardise the success of the operations of any of His Majesty's Forces or to assist the enemy or to prevent the spread of reports likely to cause disaffection or alarm, or
- “(b) to secure the safety of any means of communication or of railways, docks or harbours, or of any area which may be proclaimed by the Admiralty or Army Council which it is necessary to safeguard in the interests of the training or concentration of His Majesty's Forces,
- “(c) and may by such regulations also provide for the suspension of any restrictions on the acquisition of land or user of land or the exercise of the power of making by-laws or any other power under the Defence Acts, 1842 to 1875, or the Military Land Acts, 1891 to 1903;

in like manner as if such persons were subject to military law and had on active service committed an offence under section five of the Army Act ”

It may be observed, first, that the Act is in form merely declaratory. The Act says, “His Majesty in Council has power to issue regulations as to the powers and duties of the Admiralty,” etc. This must mean regulations as to the existing powers and duties. It does not create new powers. Consequently regulations, for example, giving the competent authority power to arrest without warrant, to destroy private property except in case of actual danger, to enter upon any land or buildings, were all *ultra vires*. Hence, Act No. 3 was passed on November 27, 1914, known as The Defence of the Realm (Consolidation) Act,¹ whereby “His Majesty in Council has power . . . to issue regulations for securing the public safety and the defence of the realm and as to the powers and duties for that purpose of the Admiralty, &c ; and may by such regulations authorise the trial by courts-martial or in the case of minor offences by courts of summary jurisdiction and punishment of persons committing offences against the regulations, and in particular against any of the provisions of such regulations designed— ”

Then follow the provisions of the former Acts, with some additions and with the proviso of the death penalty where the offence is committed with the intention of assisting the enemy. The effect, therefore, was to give to the Executive a general power to make regulations for the public safety and the defence of the realm, and to subject all offenders against them to military law. Against this infringement of

¹ 5 Geo. 5, c. 8.

the liberty of the subject a stand was made in the House of Lords by Lords Halsbury, Haldane, Bryce, Loreburn and Paimoor, and Act No. 4 was passed on March 16, 1915². By this statute the right of a British subject charged with an offence against the Regulations to be tried by a civil Court with a jury was restored. "British subject" for this purpose included a woman who before her marriage with an alien was a British subject. The person charged was entitled within six clear days from the time when the general nature of the charge was communicated to him to exercise this right, and such communication was to be in writing and notice in writing of his rights to be given at the same time. But in the event of invasion or other special military emergency arising out of the war, the operation of these provisions might be suspended by proclamation. They were in fact suspended in Ireland by the Proclamation of April 26, 1916.

By these statutes and regulations the country was to a large extent placed under a military dictatorship. For what was a competent military authority? It was any officer not below the rank of a lieutenant-commander in the Navy or of a field officer in the Army, and any person authorised by them, and, in some circumstances, any police constable. These persons were to a large extent irresponsible. There was practically no appeal from their decisions: they could act on mere suspicion. For instance, by Reg. 14, where the competent authority honestly suspected a person of being about to act in a manner prejudicial to the public safety, such person might be prohibited from living in a particular area. In *Rez v. Denison*, 32 T. L. R. 528; 85 L. J. K. B. 1744, relief was refused since there was no evidence that the competent authority had acted dishonestly. And it was held by *Darling, J.*, in *Ronnfeldt v. Phillips*, 34 T. L. R. 556; 35 T. L. R. 46, that the plaintiff must satisfy the Court that the order was made without the military officer really suspecting the plaintiff. If the military authority honestly suspected the plaintiff, it was not necessary that they should have had reasonable grounds of suspicion.

In *Michael v. Block*, 34 T. L. R. 438, hearsay evidence was allowed. It was held that the word "behaviour" in Reg. 55 included all acts of which the competent authority might be credibly informed, and was not restricted to matters actually witnessed by the person giving such information. In *Sheffield Conservative and Unionist Club v. Brighten* (1916), 32 T. L. R. 598; 85 L. J. K. B. 1669, the premises of the club were taken under Reg. 2. It was held that the purpose for which they were taken, even if only indirectly necessary for the defence of the realm, came within the Regulation. It was argued that the

² Defence of the Realm (Amendment) Act, 1915 (5 Geo. 5, c. 34)

military authorities had acted so unreasonably that they could not have acted in good faith, but *Atoray, J.*, held that unless the Court could say that the action of the authorities was so unreasonable as to be obviously not *bona fide*, their opinion must be conclusive.

Chester, Appellant, v. Bateson, Respondent.

[1920] 1 K. B. 829; 36 T. L. R. 225; 89 L. J. K. B. 387.

Case.] The appellant appealed by case stated by the magistrates of Ulverston, Lancashire, who had dismissed a complaint preferred by him under the Small Tenements Act, 1838, for recovery of possession of his house and the ejectment of the tenant upon the ground that he was precluded from making such a complaint by Regulation 2A (2) of the Defence of the Realm Act, 1914. By this Regulation the Minister of Munitions was empowered to take possession of any unoccupied premises for the purpose of housing workmen employed in the production, storage or transfer of war material, and if of opinion that the ejectment of the workmen so employed would be prejudicial, to make an order declaring the area a special area. And "whilst the order remains in force no person shall without the consent of the Minister of Munitions take or cause to be taken any proceedings for the purpose of obtaining an order or decree for the recovery of possession of or for the ejectment of a tenant of any dwelling-house or other premises situate in the special area, being a house or premises in which any workman so employed is living. . . . If any person acts in contravention of this Regulation he shall be guilty of a summary offence."

Judgment.—In remitting the case to the magistrates for reconsideration, the Court was unanimous in declaring that the provision requiring the consent of the Minister to proceedings was *ultra vires*. "It might have been competent under the words of the statute," said *Sankey, J.*, "although I express no opinion on the point, to make regulations constituting the consent of the Minister of Munitions in a proper case to the making of an order for the recovery of possession

of, or for the ejectment of a tenant of, any dwelling-house or other premises of the character referred to. It was not, however, competent for His Majesty in Council to make a regulation enacting that a man who seeks the assistance of the King's Courts should be exposed to fine and imprisonment for having done so. It would have been astonishing if Parliament had conferred such a power. See what would have happened in a doubtful case. A man believing in all good faith that he was entitled to bring proceedings finds he is wrong on the evidence, but the mere fact of his having brought them is to make him guilty of an offence and liable to fine and imprisonment. I am of opinion that the regulation so made is beyond that power conferred by the Act of Parliament. I should be slow to hold that Parliament conferred such a power unless it expressed it in the clearest possible language, and should never hold that it was given indirectly by ambiguous regulations made in pursuance of any Act."

"*Note*—*Darling*, J., referred with approval to the judgment of *Scrutton*, J., in *Re Boaler*, [1915] 1 K. B., at p. 36; 83 L. J. K. B. 1629, where he said. "One of the valuable rights of every subject of the King is to appeal to the King in his Courts if he alleges a civil wrong has been done to him or if he alleges that a wrong punishable criminally has been done to him or has been committed by another subject of the King. This right is sometimes abused, and it is, of course, quite competent to Parliament to deprive any subject of the King of it either absolutely or in part. But the language of any such statute should be jealously watched by the Courts, and should not be extended beyond its least onerous meaning unless clear words are used to justify such extension." And *Sankey*, J., referred to the same judgment, at p. 41, when the learned Judge, finding that the words used in the Act were capable of two meanings, a wide and a narrow one, chose the latter, declining to make the more serious interference with the liberty of the subject unless the Legislature uses language clear enough to convince him that such was its intention."

It should be noted that the decision of the House of Lords in *Rex v. Halliday* was followed and approved by the Divisional Court in *Ernest v. Commissioners of Metropolitan Police* (1920), 89 L. J. K. B. 42.

RIGHT OF PUBLIC MEETING.

Beatty v. Gillbanks.

9 Q. B. D. 308; 51 L. J. M. C. 117. (1882.)

Case.] The appellants were charged with unlawfully and tumultuously assembling with divers other persons to the number of one hundred or more in public thoroughfares in Weston-super-Mare to the disturbance of the public peace and against the peace of the Queen. At the hearing before the Justices they were bound over. The appellants were leaders of the Salvation Army, members of whom were in the habit of forming themselves into processions and parading the streets of the town, with bands and banners, collecting people as they marched back to their hall where meetings followed

Judgment.—In delivering the judgment of the Divisional Court, *Field, J.*, said: “I am of opinion that this order cannot be supported. The appellants have, with others, formed themselves into an association for religious exercises among themselves, and for a religious revival, if I may use that word, which they desire to further among certain classes of the community. No one imputes to this association any other object, and so far from wishing to carry that out with violence, their opinions seem to be opposed to such a course; and at all events in the present case they made no opposition to the authorities. That being their lawful object, they assembled as they had done before and marched in procession through the streets of Weston-super-Mare. No one can say that such an assembly is in itself an unlawful one. The appellants complain they have been found guilty of a crime of which there is no reasonable evidence that they have been guilty. The charge against them is that they unlawfully and tumultuously assembled, with others, to the disturbance of the public peace and against the peace of the Queen. Before

they can be convicted it must be shown that some offence has been committed. There is no doubt that they and with them others assembled together in great numbers, but such an assembly to be unlawful must be tumultuous and against the peace. As far as these appellants are concerned there was nothing in their conduct when they were assembled together which was either tumultuous or against the peace. But it is said that the conduct pursued by them on this occasion was such, as on several previous occasions, had produced riots and disturbance of the peace and terror to the inhabitants and that the appellants knowing when they assembled together that such consequences would again arise are liable to this charge."

"Now I entirely concede that everyone must be taken to intend the natural consequences of his own acts, and it is clear to me that if this disturbance of the peace was the natural consequence of acts of the appellants they would be liable, and the Justices would have been right in binding them over. But the evidence set forth in the case does not support this contention; on the contrary it shows that the disturbances were caused by other people antagonistic to the appellants, and that no acts of violence were committed by them."

The learned Judge then referred to the definitions of unlawful assembly in Hawkins' Pleas of the Crown, s. 9. In the examples there cited the circumstances of terror exist in the assembly itself, either in its object or mode of carrying it out. "What has happened here," said his lordship, "is that an unlawful organisation has assumed to itself the right to prevent the appellants and others from lawfully assembling together, and the finding of the Justices amounts to this, that a man may be convicted for doing a lawful act if he knows that his doing it may cause another to do an unlawful act. There is no authority for such a proposition."

Note—It was held in *De Morgan v. Metropolitan Board of Works* (1880), 5 Q. B. D. 155; 49 L. J. M. C. 51, that no right on the part of the general public to hold meetings on a common is known to the

law In this case Clapham Common had been purchased by the Government and dedicated to the use of the public as an open space, and the Metropolitan Board of Works were empowered to frame by-laws and regulations Public speeches, etc., were by a by-law prohibited except with the written permission of the Board In the same way Trafalgar Square was vested in the Commissioner of Works and under the management of the Metropolitan Police In *Reg. v. Cunningham Graham and Burns*, *infra*, the meeting in Trafalgar Square had been prohibited by the police In his direction to the jury *Charles, J.*, said "I can find no warrant for telling you that there is a right of public meeting either in Trafalgar Square or any public thoroughfare So far as I know the law of England, the use of public thoroughfares is for people to pass and repass along them That is the purpose for which they are, as we say, dedicated by the owner of them to the use of the public, and they are not dedicated to the public use for any other purpose than that I know of than for the purpose of passing and repassing; and if you come to regard Trafalgar Square as a place of public resort simply, it seems to me it would be analogous to the case of public thoroughfares; and equally on the part of the public, although they may often do it without objection, the public have no right to hold there any meetings for discussion upon any questions, be they social, political or religious"

In *Wise v. Dunning*, [1902] 1 K. B. 167; 71 L. J. K. B. 165, there was evidence that on former occasions owing to the provocative language used by the appellant, a Protestant clergyman, respecting the Roman Catholic faith breaches of the peace had occurred and he was bound over to be of good behaviour by the stipendiary magistrate for Liverpool. The appellant contended that there was no evidence that he had committed or intended to commit a breach of the peace. "There was abundant evidence," said Lord *Alverstone*, C. J., "to show that in the public streets he had used language which had caused an obstruction, which was abusive, and that he threatened and intended to do similar acts in another place" "The kind of person which the evidence here shows the appellant to be," said *Darling, J.*, "I can but describe in the language of Butler. He is one of

' . . . that stubborn crew
Of errant saints, whom all men grant
To be the true Church militant,

A sect whose chief devotion lies
In odd perverse antipathies.'"

Hudibras—Pt I

It was said that *Blatty v. Gullbanks* conflicted with the magistrate's decision. *Darling J.*, was not sure that it did. He thought the whole question was one of fact and evidence. "The law," said *Channell, J.*, "does not as a rule regard an illegal act as being the natural consequence of a temptation which may be held out to commit it. but I think the cases with respect to apprehended breaches of the peace show that the law does regard the infirmity of human temper to the extent of considering that a breach of the peace, although an illegal act, may be the natural consequence of insulting or abusive language or conduct."

SLAVERY.

Shanley v. Harvey.

2 Eden, 126. (1762.)

Case.] A lady, the owner of a negro servant called Harvey, had made a *donatio mortis causa* to him. Her administrator filed a bill against the negro and his trustees, claiming the gift as part of the deceased's estate.

The bill was dismissed with costs by *Northington, C.*

Held:—As soon as a man sets foot on English ground he is free. A negro may maintain an action against his master for ill-usage, and may have a *habeas corpus* if restrained of his liberty.

Note.—The subject of *Slavery* is perhaps strictly not a question of Constitutional Law; since personal liberty in this sense is one of those primary general rights, maintainable not against the Government as such, but against all the world. Yet in deference to ordinary usage the chief cases connected with the doctrine of slavery in England are here included.

The case above is given as an earlier assertion of the English doctrine than Lord Mansfield's famous judgment in *Sommersett v Stewart*, although the question is here less directly before the Court. The latter decision, while affirming the doctrine expressed by Lord Northington, was only extorted from Lord Mansfield after he had delayed judgment for three terms, and had vainly struggled to induce the parties to a compromise.

It is noticeable that only in 1729 Mr., afterwards Lord, Talbot, A.-G., and Mr. Yorke, afterwards Lord Hardwicke, S.-G., had given an opinion "that a slave coming from the West Indies to Great Britain doth not become free," and pledged themselves to the London Merchants to save them harmless in such matters¹. And in *Smith v Brown* and *Smith v. Gould* (1706), 2 Salk 666, the Judges apparently considered

¹ Per Lord Stowell in *The Slave Grace's Case*, 2 Hagg, at p 104
T.L.C.

that if the claim were properly formulated in the pleadings a right of property in a negro would be recognised by the Court. The question was doubtless one of difficulty inasmuch as the former legal status of villeinage was indisputable and had never been abolished, and by several English statutes the legal existence of slavery in the Colonies had been fully recognised.

Sommersett's Case.

20 St. Tr. 1—82; *Lofft*, Easter Term, 1772, p. 1.

Case.] Sommersett, a Virginian slave, having been brought to England by his master, left his service and refused to return. His master seized him and committed him to the custody of a ship captain for the purpose of sending him to Jamaica to be sold as a slave. The captain was ordered by writ of *habeas corpus* to return the body of James Sommersett with cause of detainer into the King's Bench. The captain's return to the writ set forth the above facts.

Sommersett's cause was argued by Mr Hargrave:

1. The only kind of slavery recognised by English law is Villeinage, and the last instance of that in the Courts was the case of *Pigg v. Caley* (1617), Noy, Rep. 27. Even here the Judges had always presumed in favour of liberty, and the law recognised no villein save by prescription or the villein's confession. 2. The fact that no new form of slavery has since arisen affords a presumption that the law will admit none.

Judgment.—Lord Mansfield, C.J., delivered judgment that the return was insufficient. "The state of slavery . . . is so odious that nothing can be suffered to support it but positive law. Whatever inconveniences, therefore, may follow from the decision, I cannot say this case is allowed or approved by the law of England and therefore the black must be discharged."

Held:—That slaves coming into England cannot be sent out of the country by any process to be there executed, but if

forcibly detained here are entitled to be discharged by writ of *habeas corpus*

*Note—All this case expressly decided was, that a slave coming here cannot be sent out of the country against his will. In *Knigt v. Wedderburn*, 1778, a Scotch case decided a few years later, *Somerset's Case* was relied on, and its principle extended, to declare that the slave was not bound to serve his master here (v 20 St Tr 1 n). The "inconvenience" mentioned in Lord *Mansfield's* judgment was that (as was alleged in the argument) there were then about 15,000 negro slaves in the kingdom, who would all be affected by the judgment.

Forbes v. Cochrane (and Cockburn).

2 L. J. (o.s.) K. B. 67; 2 B. & C. 448; 26 R. R. 402. (1815.)

Case.] The plaintiff was a British merchant domiciled in Spanish Florida, and held there, as it was lawful to do, a number of slaves. Thirty-eight of these deserted one night, and were found next day upon a British ship of war lying within a mile of the shore. The commander declined to compel them to return, and an action was therefore brought by the plaintiff against him and against his commander-in-chief, who had endorsed his conduct

A jury found for the plaintiff subject to a special case which was argued before *Bayley*, *Holroyd*, and *Best, JJ.*, and decided for the defendants.

Judgment.—In an English ship, which may for this purpose be considered as a "floating island," these slaves were subject only to English law—and by that they were not slaves. The defendants did all they were legally bound to do to assist the plaintiff, perhaps more; they permitted him to endeavour to *persuade* the slaves to return. They were not bound to *force* them to return.

Held, therefore, that no action will lie against an officer who receives slaves into a British vessel and refuses to give them up.

Note—*Stephen, J*, says (2 Hist Crim Law, 55) that the judgment in this case proceeded on the ground that the ship was not in Spanish waters at the time, and that would appear from the judgment of *Best, J*, at p 467 of the report But *Stephen, J*, expresses an opinion that commanding officers of British ships of war in *foreign territorial waters* are under an obligation imposed by international law to deliver up fugitive slaves when required to do so by the local authorities in accordance with the local law, and that it is doubtful whether by refusing to discharge that obligation they might not incur a personal responsibility to the owners of the slaves This view, however, is opposed to the British practice By the Fugitive Slave Circular of 1876 a commander may receive fugitive slaves in his discretion in the territorial waters of a State where slavery exists, but when once received no demand for their surrender based solely on the ground of slavery is to be entertained See Pitt Cobbett, *Leading Cases on International Law*, Vol. I, 4th ed by Bellot, p. 274

Case of the Slave Grace (The King v. Allan).

2 Hagg. Adm. R. 94—134. (1827.)

Case.] Mrs. Allan, of Antigua, had brought a female slave to England in 1822, and the next year returned, taking the slave with her to Antigua. In 1825 the slave was seized by the Custom House at Antigua as forfeited to the King, on suggestion of having been illegally imported in 1823. The case was decided in favour of Mrs. Allan in Antigua, and an appeal was brought by the Crown to the Admiralty Court in England.

Judgment—Per Lord Stowell. This question turns really upon the count that the slave Grace, “being a free subject of his Majesty, was unlawfully imported as a slave from Great Britain into Antigua.”

Held—That the slave having accompanied her mistress into England, and there taken no step to establish her freedom, upon returning voluntarily to a country where slavery was legal, reverted to the condition of a slave; and her stay in England had only put her liberty, as it were, into a sort of parenthesis

ALIENS.

Re Castioni.

[1891] 1 Q. B. 149; 60 L. J. M. C. 22.

Case.] A number of the citizens of one of the Cantons of the Swiss Republic (Ticino) being dissatisfied with the administration of the Government of the Canton rose against the Government, arrested several members thereof, seized the arsenal, from which they provided themselves with arms; attacked, broke open and took forcible possession of the municipal palace, disarmed the gendarmes, imprisoned some members of the Government and established a provisional Government. On entering the palace, the prisoner, who had taken an active part in the rising, shot at and killed Rossi, a member of the Government. He escaped to England, where he was arrested and committed for extradition on a charge of murder.

He moved for a writ of *habeas corpus*.

By the Extradition Act, 1870 (33 & 34 Vict. c. 52), "A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character."

Judgment.—The prisoner, said *Denman*, J., knowing nothing about Rossi, having no spite or ill-will against him, fired the shot thinking that it would advance the purpose of the rising. He entirely dissented, however, from the proposition that any act done in the course of a political rising or any insurrection is necessarily of a political character.

Hawkins, J., said if a man were deliberately from motives of private revenge to shoot an unoffending man, because he happened himself to be one of an insurgent crowd, no reasonable being would question that he was guilty of the crime of murder.

It was obvious to his mind, said *Stephen, J.*, that the shooting on this occasion took place in a scene of very great tumult at a moment when if a man decided to use deadly violence he had very little time to consider what was happening and to see what he ought to do, and that therefore he was committing an act greatly to be regretted. He had no doubt that the writ of *habeas corpus* ought to run, and the prisoner set at liberty.

Held.—That the offence was incidental to and formed part of political disturbances and therefore was an offence of a political character within the meaning of the statute and the prisoner could not be surrendered, but was entitled to be set at liberty.

Note—By the Aliens Restriction Act, 1914,¹ His Majesty was empowered during a state of war to make regulations for the deportation of aliens. It was held in *Rex v. Knockaloe Camp Commandant, Ex p. Forman*, 87 L. J. K. B. 43; 34 T. L. R. 4, that there was nothing in the Act destroying the prerogative of the Crown to intern enemy aliens as prisoners of war. In *Rex v. Governor of Brixton Prison, Ex p. Sarno*, [1916] 86 L. J. K. B. 62; 115 L. T. 608, an order for the deportation of Sarno was made by the Home Secretary under Reg. 12 of the Aliens Restriction (Consolidation) Order, 1914. The Regulation, said *Reading, C.J.*, was framed in accordance with the power conferred by the statute, the whole scope of which was to give extraordinary powers to the King in Council whereby he could confer on the Secretary of State extraordinary powers for dealing with aliens. In *Rex v. Home Secretary, Ex p. Duke of Chateau-Thierry*, [1917] 86 L. J. K. B. 923; 116 L. T. 226, the Home Secretary made an order for the deportation of the Duke, a Frenchman, who had been resident in Great Britain since 1907, and who alleged that he was a political refugee and unfit for military service. The French Government claimed him for military service. It was held by the Divisional Court that the Regulation did not extend to sending an alien to a country to which he did not desire to go, but the Court of Appeal held that under Reg. 12 the Home Secretary was empowered to choose a ship and put an alien on board and compel him to leave the country. The effect might be to carry the alien to his country of origin, but there was no

¹ 4 & 5 Geo. 5, c. 12

power to specify in the order to what country he should be sent. In *Rex v Superintendent of Chiswick Police Station, Ex p Sacksteder*, [1918] 87 L. J. K. B. 608, 118 L. T. 165, Sacksteder, an absentee from the French Army, asked for leave to enlist in the British Army. The request was granted, but he failed to enlist. An order was consequently made under the Regulation for his deportation. *Held*, that the order was valid and there was no reason for the Court to go behind it.

Further restrictions were imposed upon aliens, some of a temporary character only, by the Aliens Restriction (Amendment) Act, 1919.² By this Act an alien who attempts or does any act calculated or likely to cause sedition or disaffection among the Forces or the civil population or promotes or attempts to promote industrial unrest is liable to penal servitude or imprisonment. No alien may hold a pilot's certificate or act as master of a British merchant ship or hold any appointment in the Civil Service. Former enemy aliens may be deported, and no former enemy alien might land for three years after the passing of the Act without the permission of the Secretary of State.

In *Rex v. Inspector of Leman Street; Ex p. Vinicoff*, and *Rex v Secretary of State*, [1920] 3 K. B. 72, 89 L. J. K. B. 1200, it was held that under Art. 12 (1) of the Aliens Order, 1919, the Home Secretary was not bound before making an order for the deportation of an alien on the ground that he "deems it to be conducive to the public good" to hold an inquiry as a judicial tribunal, but that he acts as an executive officer.

In *The King v Secretary of State for Home Affairs, Ex p O'Brien*,³ where O'Brien had been arrested and deported to the Irish Free State under an order of the Home Secretary, purporting to be made under Reg. 14B of the Regulations made by virtue of the Restoration of Order in Ireland Act, 1920,⁴ it was held by the Court of Appeal that Reg. 14B was inconsistent with the Irish Free State Constitution Act, 1922,⁵ and impliedly repealed by it, and consequently the order of internment was bad. The order for the issue of a writ of *habeas corpus* directed to the Home Secretary was made absolute. Upon appeal it was held by the House of Lords that no appeal to a superior Court lies from an order of a competent Court for the issue of a writ of *habeas corpus*, where the Court determines the illegality of the applicant's detention and his right to liberty, although the order does not direct his discharge.⁶

² 9 & 10 Geo. 5, c. 92.

⁴ 10 & 11 Geo. 5, c. 31.

⁵ 18 Geo. 5, Sess. 2, c. 1.

⁶ [1923] A. C. 603.

³ [1923] 2 K. B. 361; 92 L. J. K. B. 797.

RIGHT OF IMPRESSMENT.

Rex v. Broadfoot.*Foster*, 154; 18 *St. Tr.* 1323. (1743.)

Case.] At the gaol delivery held at Bristol, Broadfoot was indicted for the murder of Calahan, a sailor belonging to one of his Majesty's ships. The deceased had been shot by Broadfoot while the latter was endeavouring to avoid being pressed. The men engaged in pressing were not accompanied by a commissioned officer, as required by the terms of the press-warrant.

The Recorder, Serjeant *Foster*, directed the jury that as no commissioned officer was present everything the press-gang did must be regarded as an illegal attempt upon the liberty of the person concerned, and he told them to find the prisoner guilty of manslaughter. But "this being a case of great expectation," he thought it proper to deliver his opinion that—

Pressing for the sea-service is legal, provided the persons impressed are proper objects of the law, and those employed in the service are armed with a proper warrant.

Note—The practice of impressment, though now it may perhaps be considered of merely historic interest, is important in connection with constitutional doctrines, and especially the English doctrine of personal liberty. Nor is it, perhaps, altogether impossible to imagine a revival of the practice if the public necessity should so require.

Impressment of soldiers was always less used than that of sailors. The statute 16 Car. 1, c. 23, after reciting that by law no subject ought to be impressed or compelled to go out of his country to serve as a soldier "except in case of necessitie of the sudden coming in of strange enemies into the kingdom," or unless bound by the tenure of his lands, authorised an impressment during the following year. Since then impressment for the Army has never been exercised except by statute, as was the case, for example, in 1706 (4 Anne, c. 10), in 1757 (30 Geo. 2

c 8), and in 1779 (19 Geo 3, c 10, during the American War) Hallam¹ has overlooked this last statute, when he speaks of 1757 as the last occasion; the impressment was, however, confined to such able-bodied idle and disorderly persons who did not exercise a lawful trade or employment or have some substance sufficient for their support, and to convicted smugglers

The Crown has, however, by immemorial right the power to compel its male subjects between, as fixed by statute, the ages of 18 and 30 to serve in the Militia for home defence only, the selection of the men bound to serve being by ballot. This is regulated by various statutes, chiefly by 42 Geo. 3, c 90, 23 & 24 Vict. c 120, and 45 & 46 Vict. c. 49. But by annual Acts of Parliament the proceedings for raising the Militia by ballot have been for many years annually suspended unless an Order in Council should be made to the contrary, and this suspension is still continued by an Expiring Laws Continuance Act²

Under the reorganisation of the Forces in 1907 and 1908, the Militia ceased to be raised in the United Kingdom, and its units were transferred to the Special Reserve. The existing units of the Volunteers were at the same time transferred to the newly-created Territorial Forces, into which the Yeomanry was also absorbed. During the war of 1914 it became necessary to have recourse to conscription, and the Military Service Acts (5 & 6 Geo 5, c. 164, and 6 & 7 Geo 5, c 15) were passed, making military service with the Regular Forces obligatory upon all males between 18 and 41, with certain exceptions

The impressment of sailors was generally regarded as a prerogative of the Crown, though its legality was questioned by some, as, *e.g.*, by Emlyn, who, writing in 1730,³ observes that he does not know that "the practice ever had the sanction of one judicial determination." Foster, also, could find no decision directly in favour of the practice, though he had no doubt as to its legality. His view was afterwards affirmed by Lord Mansfield in *R v Tubbs*, 1776,⁴ "the power of pressing is founded upon immemorial usage"; and Lord Kenyon in *Ex p Fox*, 1793,⁵ "the right of pressing is founded on the common law, and extends to all sea-faring men"

¹ 3 Const Hist 212.

² See Manual of Military Law, 164 *et seq*

³ See Preface to State Trials, p xxviii

⁴ Cowp 512.

⁵ 5 T R 276; 2 R R. 596.

GENERAL WARRANTS.

Leach v. Money.

3 Burr. 1692, 1742; 19 St. Tr. 1001. (1765.)

Case.] This was an action of trespass by Mr Wilkes's printer against three King's Messengers for trespass and false imprisonment. The defendants justified their conduct under a warrant of Lord Halifax, a principal Secretary of State, which required the defendants to search for the authors, printers, and publishers of an alleged seditious libel entitled *The North Briton*, and to apprehend them together with their papers. The plaintiff was apprehended and released after four days, as he turned out not to be the printer. The jury found for the plaintiff—£400 damages.

Upon a bill of exceptions being tendered and a writ of error brought, it was argued that such warrants had been sanctioned by long custom; and that a Secretary of State, as a sentinel of the public peace, must have the power to issue them. As a conservator of the peace, he was protected by statute 7 Jac. 1, c. 5; 24 Geo. 2, c. 44.

Judgment.—Per Lord Mansfield, C J.:—There is no case for these uncertain warrants; it is not fit that the judging of the information should be left to the discretion of the officer. The magistrate ought to judge, and give definite directions to the officer as to the person to be arrested. Nor is it enough that the usage has been so. A usage, to grow into law, ought to be a general usage; this is but the usage of a particular office, contrary to the usage of all other Justices. No degree of antiquity can give sanction to a usage bad in itself.

The warrant had not been pursued, for the person taken up was neither author, printer, nor publisher, and this alone

was a sufficient justification for the judgment, which was accordingly affirmed. As the Justice would not be liable, the officer has no protection.]

Wilkes v. Wood.

19 St. Tr. 1153; *Lofft, Michaelmas Term, 1763*, p. 1.

Case.] [Wood was secretary to a Secretary of State, and, with a constable and several King's Messengers, entered into Mr. Wilkes's house, broke open his locks, and seized his papers. The warrant upon which this was done merely directed the messenger "to make strict and diligent search for the authors, printers, and publishers of a seditious and treasonable paper, entitled *The North Briton*, No. 45, and these or any of them being found, to apprehend and seize, together with their papers." Wilkes brought an action of trespass. The action was tried before *Pratt*, C J., [Lord Camden], and a special jury.

Judgment.—The Chief Justice in his charge to the jury pointed out that the defendant claimed a right to force persons' houses, break open escritaires and to seize papers, &c., upon a general warrant where no inventory was made of the things taken away and no offenders' names were specified in the warrant, and therefore a discretionary power was given to messengers to search wherever their suspicions might chance to fall. If such a power was vested in a Secretary of State and he could delegate this power, it certainly might affect the person and property of every man, and was totally subversive of the liberty of the subject.]

Verdict for the plaintiff—damages, £1,000.

Entick v. Carrington.

19 St. Tr. 1080; 2 Wils. 275. (1765.)

[Case.] The defendant, with three other persons, King's Messengers, acting under a warrant from a Secretary of State, had forcibly entered the plaintiff's house, he being alleged to be the author of a seditious libel, and carried away his books and papers: upon which he brought an action of trespass. The jury returned a special verdict, stating that the defendants had acted upon a warrant from a Secretary of State, authorising the arrest of the plaintiff by name and the seizure of his papers, and that it had been the custom for Secretaries of State since the Revolution to issue such warrants; they assessed the damages at £300 if the defendants were liable.

This special verdict was twice argued, and judgment was delivered by Lord *Camden*, C.J., for the plaintiff.

Judgment —A Secretary of State is the King's private secretary, but has not in consequence the authority of a magistrate. Nor has any magistrate such a power of commitment without a power to examine upon oath. No individual Privy Councillor, as such, has a right to commit. As to the power of seizing papers, that is not supported by one single citation from any law book extant, and is claimed by no other magistrate in this kingdom, not even by the Lord Chief Justice of the King's Bench.

Held.—"That the warrant to seize and carry away the party's papers, in the case of a seditious libel, is illegal and void."]

NOTE VI.—GENERAL WARRANTS.

[The practice of issuing general warrants to arrest, in which no particular person was specified, is said to have originated with the Star Chamber. It was afterwards revived by the Licensing Act of Charles II, and authorised to be used by the Secretary of State, and the practice is supposed to have continued after the expiration of that Act in 1694. At all events, it had been frequently exercised even after the Revolution.]

The illegality of such warrants was finally settled, as well as the illegality of warrants to seize papers, by the judgments in the above cases. Each of the cases given decides a different point. *Leach v Money* that a general warrant to seize some person not named is illegal; *Wilkes v Wood* decides the illegality of a warrant to seize the papers of a person not named; while *Entick v Carrington* carries the latter point further, and establishes the illegality of a warrant to seize the papers of a person named—manifestly a sort of general warrant as regards the papers. These decisions are supported by two able judgments—of Lord Mansfield, in *Leach v Money* in error, and of Lord Camden in *Entick v Carrington*.]

In a subsequent action, tried in 1769 before *Wilmot*, C J., and a special jury, against Lord Halifax, the Secretary of State, who had issued the warrants in question, Wilkes recovered £4,000 damages,¹ and we are told that “the verdict was much less than the friends of the plaintiff expected, and so little to the satisfaction of the populace, that the jurymen were obliged to withdraw privately, for fear of being insulted.”

The House of Commons, while the Courts were thus engaged, was also debating the subject and in 1766 passed resolutions declaring such warrants not only to be illegal, but, if executed on the person or papers of a member of the House, to be a breach of privilege. As to this declaration, it is to be observed that Lord Mansfield, in a speech in the House of Lords, objected to it on the ground that declarations of the law by either House of Parliament have no binding force, and are not necessarily to be adopted by the Courts.

At the same time he affirms that “general warrants are no warrants at all, because they name no one”; with which may be compared

¹ 19 St Tr 1406—1415

Wilkes's refusal to obey the warrant, as "a ridiculous warrant against the whole English Nation"²

The only warrant recognised by the law which can in any way be called a "general" warrant is a search warrant for goods stolen, or fraudulently obtained, or unlawfully pawned, or in respect of which forgery has been committed. The origin of this kind of warrant is unknown, and Lord Camden in his judgment in *Entick v Carrington* says that it crept into the law by imperceptible practice. The practice in issuing these search warrants is now, however, in most cases regulated by 24 & 25 Vict c 96, s 150 (the Larceny Act), which provides that a justice of the peace may, upon proof by a credible witness of a reasonable cause to suspect that any person has in his possession or on his premises any property with respect to which any offence punishable under that Act shall have been committed, grant a warrant to search for such property. It is not, however, necessary (although it is usual) to specify the exact goods for which a search is to be made³. The place to be searched must be specified in the warrant, as a general warrant to search all suspected places would be bad⁴.

² 2 May, Const Hist. Eng 124

³ *Jones v German*, [1896] 2 Q B 418, [1897] 1 Q B 374, 66 L J Q B 281, 75 L T 161, 60 J P 616

⁴ 5 Burn's Justice of the Peace (30th ed), p 1182

MILITARY AND MARTIAL LAW.

Grant v. Sir Charles Gould.

3 R. R. 342; 2 H. Bl. 69. (1792.)

Case.] This was a motion for a prohibition to prevent the execution of a sentence of a thousand lashes passed on the plaintiff by a general court-martial. The plaintiff had been charged before the court-martial with persuading two soldiers to desert in order to join the East India Company's service. He denied that he was a soldier, or liable to martial (meaning *military*) law, though he admitted that for purposes of a recruiting agent he assumed the character of a sergeant in the 4th regiment, to enable him to carry on the business of a recruiting agent, and received pay and allowances as such; or that he had been guilty of a military offence. The plaintiff ~~had~~ been convicted and sentenced, applied to the King's Bench for a prohibition.

Judgment.—Lord Loughborough, C.J., pointed out that martial law does not exist in England at all." When martial law is established it is very different from what is commonly called martial law merely because it is the necessity of a court-martial. Where martial law prevails, the country under which it is exercised claims a jurisdiction over military persons; every species of offence committed by a person who appertains to the Army is tried, not by a judge, but by the judicature of the regiment or district to which he belongs. The Mutiny Act has created a court to try those who are a part of the Army for breaches of military duty. "Naval courts-martial, military courts-martial, Courts of Admiralty and Courts of Prize, are all liable to the controlling authority which the Courts of Westminster exercise from time immemorial exercised for the purpose of

preventing them from exceeding the jurisdiction given to them.”

The motion was therefore refused.

Note—Much confusion has often arisen between the terms “military law” and “martial law,” and it cannot be said that Lord *Loughborough*’s judgment in the above case is altogether calculated to lessen the confusion.

Military law is the law which at all times, whether in peace or war, at home or abroad, governs the soldier. Civilians are in no case subject to it, unless as members of the Reserve or Territorial Forces they are called out for actual military service or training, and, even if they are riotous or insurgent, civilians cannot be dealt with under military law, but must be left to the ordinary civil Courts. Although military Courts have jurisdiction over soldiers in respect of many ordinary criminal offences as well as for breaches of discipline, the civil Courts also have jurisdiction over them as regards offences against the law of the land; and by section 41 of the Army Act a soldier is not to be tried by court-martial for treason, murder, manslaughter, treason-felony, or committed in the United Kingdom. Military law is to be found in the Army Act (44 & 45 Vict. c. 58), supplemented by Rules of Procedure made by Her Majesty under that Act, by the annual Army Act, the King’s Regulations, and by Army Orders.¹

Originally *martial law* was the law administered in the Court of the Constable and Marshal, which had jurisdiction over (1) offences of death or murder beyond the seas; (2) prisoners of war; (3) offences of soldiers contrary to the laws and regulations of the Army. But by the reign of James I this jurisdiction had been entirely lost, and the Court itself become little more than a Court of chivalry. The seventeenth-century lawyers understood martial law to mean military law—i.e., the code of military regulations necessary to maintain discipline and applicable to soldiers only and to no civilians. The Stuarts attempted to impose military law upon the civil population, and it was in this sense that martial law was referred to in the Petition of Right (3 Car. 1, c. 1), which declared the illegal “divers commissions under your Majesty’s great seal by which persons have been assigned and appointed commissioners with full power and authority to proceed within the land according to the tenor of martial law against such soldiers or mariners, or other dissolute

¹ Full information on this subject will be found in the *Manual of Military Law*.

joining with them, as should commit any murder, robbery, felony, mutiny, or other outrage or misdemeanour whatsoever, and by such summary course and order as is agreeable to martial law," instead of the accused persons being proceeded against in the ordinary Courts. It must be borne in mind, however, that at the date of the Petition of Right peace undoubtedly prevailed within the kingdom

Since the Petition of Right there has been no proclamation of martial law in England, but it has been proclaimed in Ireland (in May, 1798), in the Colonies,² and in Ireland again during the war of 1914.

What is known as martial law must be carefully distinguished from that right which at common law the Government possesses to put down by force riots and violent resistance to the execution of the law. For the purpose of protecting persons or property against violent crime any soldier or police officer, and indeed any private person, is entitled to use force, and even, in a case of necessity, to take the life of the person offending.³

Although martial law in the original sense is obsolete and in the sense attributed by the Stuarts declared by the Petition of Right to be illegal, it is still used to mean the law administered by the Executive through the military authorities in time of invasion or rebellion and imposed upon the civilian population as well as upon enemy aliens or rebels. It is said to be derived from and to be based upon the King's prerogative for the maintenance of the peace. But it is really founded on necessity, and is not a peculiar attribute of the Crown. It is the right and duty, not only of the Crown or the Executive but of every subject, to assist in maintaining the peace, and any force necessary for this purpose may be used by the Crown or by anyone else, whether military or civil. "The only principle on which the law of England tolerates martial law," said the Law Officers of the Crown in 1838, "is necessity; its introduction can be justified only by necessity; its continuance requires precisely the same justification of necessity; and if it survives the necessity on which alone it rests for a single minute, it becomes instantly a mere exercise of lawless violence."

And although it is usual for the Government upon invasion or disturbance to issue a proclamation of martial law, such proclamation

² See Forsyth, *Cases and Opinions on Constitutional Law*, pp. 207—214, Halleck, *On International Law*, p. 499, Dicey, *Law of the Constitution*, pp. 284, 538.

³ See further on this subject, and as to the duty of soldiers in repressing riots, the Report of the Committee on the disturbances at Featherstone on September 7, 1893, and the Report of the Select Committee on the Employment of Military in Cases of Disturbances, Parl. Pap. 286 (1908).

has no legal effect. It must be regarded as the statement of an existing fact rather than the creation of that fact. It differs from the Continental declaration of "a state of siege" under which "the constitutional guarantees are suspended." Such suspension of the law of the land is unknown to the law of England.

The position has been clearly stated by Sir James Stephen —

"(1) Martial law is the assumption by officers of the Crown of absolute power, exercised by military force, for the suppression of an invasion and the restoration of order and lawful authority.

"(2) The officers of the Crown are justified in any exertion of physical force, extending to the destruction of life and property to any extent and in any manner that may be required for the purpose. They are not justified in the use of cruel and excessive means, but are liable civilly and criminally as the case may be. They are not justified in inflicting punishment after resistance is suppressed and after the ordinary Courts can be reopened. (See *Wright v. Fitzgerald*, 27 St Tr 765).

"(3) The Courts-martial, as they are called, by which martial law in this sense of the word is administered, are not, properly speaking, Courts-martial or Courts at all. They are merely committees formed for the purpose of carrying into execution the discretionary power assumed by the Government. On the one hand, they are not bound to proceed in the manner pointed out by the Mutiny Act and the Articles of War. On the other hand, if they do so proceed they are not prevented by them, as the members of a real court-martial might be, except so far as such proceedings are evidence of good faith. They are justified in doing, with any forms and in any manner, whatever is necessary to suppress insurrection and to restore peace and the authority of the law. They are personally liable for any acts which they may commit in excess of that power, even if they act in strict accordance with the Mutiny Act and the Articles of War"⁴

— Just as these courts-martial are not real Courts, so the law administered by them is not real law. "Martial law," said the Duke of Wellington, "is neither more nor less than the will of the general who commands the Army, in fact no law at all." Thus, for any trespass to person or property the wrongdoer may be tried at once if the civil Courts are open, and, if not, as soon as they are reopened. Indemnity Acts are a recognition of the fundamental principle of English law that a subject cannot be deprived of his common-law rights except by Act of Parliament or by some well-established principle of law. In *Ex p. Marais* [1902] A. C. 109, however, it was said by Lord Halsbury, C.,

⁴ Hist. Crim. Law, 1, p. 215.

that "where actual war is raging, acts done by the military authorities are not justiciable by the ordinary tribunals". No doubt has ever existed that where war actually prevails the ordinary Courts have no jurisdiction over the action of the military authorities". This decision has been hotly contested.⁵ It is not binding on English Courts, and probably not on the Privy Council itself. It has not been followed in any English Court. It was not followed by *McCardie, J.*, in *Heddon v Evans* (1919), 35 T L R 642, although at the date of the trial a state of war still continued. It was followed in *Rex v Allen*, [1921] 2 Ir R 241, by the Divisional Court in Ireland, where it was held that whilst war was raging it had no jurisdiction to interfere with the proceedings or sentence of a military Court. This decision was also followed in *Rex v Strickland*, [1921] 1 Ir R 265, although the Chief Justice was at the time holding the Assizes in the martial-law area. But in *Egan v Macready*, [1921] 1 Ir R 265, where the facts were similar, this principle was rejected by *O'Connor, M R.*, who said "Military authorities, like every other authority of the State, are subject to the Supreme Court of the realm". As the writ of *habeas corpus* had not been obeyed, he ordered a writ of attachment to issue against General Macready and two other officers concerned. By the Restoration of Order in Ireland Act, 1920, Parliament had invested courts-martial constituted under the Act with jurisdiction over the whole civil population for the trial of certain offences. In all these cases the military Courts were not constituted in accordance with the provisions of the Act. "Consequently," said *O'Connor, M R.*, "these courts had no legal status whatever, and the penalties awarding death sentences for the offences charged had no sanction from British law. The claim of the military authority to override legislation would seem to tend to call for a new Bill of Rights. To sweep away limitations as to punishment would be a new development of British constitutional law, for which I can find no precedent." The same view has been maintained in the United States: see *Ex p. Milligan*, 4 Wall 2.

The true rule would therefore appear to be that acts done by military authorities or other persons, and all proceedings and sentences of courts-martial, are examinable and may be reviewed by the civil Courts if they are open, not only when a state of war is over, but whilst it is actually raging. If the proceedings are shown to be necessary, naturally the Courts will not interfere, but it is for the Courts to determine whether they were necessary. That this is so appears from

⁵ See articles by Holdsworth, Erle Richards, and Dodd in xviii Law Quart Rev., and by Pollock in xix Law Quart Rev.; and see 34 Harvard Law Rev 659

the fact that Acts of Indemnity are usually passed indemnifying all persons for acts done *bona fide*. But such Acts do not usually relieve persons from responsibility for acts committed *mala fide* see *Wright v. Fitzgerald*, 27 St Tr. 765 ⁶

During the state of civil war in Ireland following the Free State (Agreement) Act, 1922,⁷ many persons who resisted the Dail or Provisional Government and were captured were tried by military Courts and sentenced to death. In the case of *Rex v. Portobello Barracks Commanding Officer, Ex p. Erskine Childers*, 67 S J 128, O'Connor, M R, refused an application for a writ of *habeas corpus* upon the ground that there was a state of war and the Courts were unable to function properly as in times of peace.

In *Re Clifford and O'Sullivan*, [1921] 2 A. C 570; 90 L J P C. 244, where the appellants had been tried and sentenced to death for being in the possession of firearms by a military Court held under the authority of the Commander-in-Chief in Ireland, they applied for a writ of prohibition against the military Court on the ground that the Court was illegal, and had no jurisdiction to deal with the matters in question. *Powell, J.*, refused the application, and the Court of Appeal in Ireland dismissed an appeal from his order upon the ground that it was an order made in a criminal cause or matter within section 50 of the Supreme Court of Judicature Act (Ireland), 1877. It was held by the House of Lords that the order of *Powell, J.*, was not made in a criminal cause or matter within the Act, because the proceedings before the military Court were in no sense criminal proceedings, and that an appeal lay from that order, and that the prohibition did not lie, first, because the officers constituting the military Court did not claim to act as a judicial tribunal in any legal sense, and, secondly, because they were *functi officio*; they had long since completed their investigation, so that nothing remained to be done by them.

In this case prohibition was not the right procedure. As Lord Sumner pointed out, the execution of the judgment did not lie with the Court; it was not in the hands of those officers or of anyone acting under their directions. It was for the general officer commanding to decide whether the sentence of the Court be carried out or not. He was not a Court and did not pretend to be one. Relief should have been sought by way of *habeas corpus*.⁸

⁶ See, generally, O'Sullivan's Military Law and the Supremacy of the Civil Courts, and Pitt Cobbett's Leading Cases on International Law, II, pp 58—61 (4th ed by Bellot).

⁷ 12 Geo 5, c. 4

⁸ See *The King (Johnstone) v The Officer Commanding Ardara House Barracks*, [1923] 2 I. R. 18.

LIABILITY OF OFFICERS INTER SE

Sutton v. Johnstone.

1 T. R. 493; 1 R. R. 257. (1786.)

Case.] The plaintiff, a naval captain, brought an action against the commanding officer of his squadron for having put him under arrest and imprisonment, and so kept him nearly three years, until the plaintiff was tried by court-martial for disobedience of orders. He was acquitted, and afterwards brought this action, alleging that in imprisoning him and causing him to be brought before a court-martial the defendant had acted maliciously and without reasonable or probable cause. The action was twice tried, and on each occasion the jury gave a verdict for the plaintiff with heavy damages.

Upon the motion to arrest judgment the Court of Exchequer decided in favour of the plaintiff. In delivering the unanimous opinion of the Court, *Eyre*, B, said: "It may not be fit, in point of discipline, that a subordinate officer should dispute the commands of his superior, if he were ordered to go to the mast-head; but if the superior were to order him thither, knowing that from some bodily infirmity it was impossible he should execute the order, and that he must infallibly break his neck in the attempt, and it were so to happen, the discipline of the navy would not protect that superior from being guilty of the crime of murder. And one may observe in general in respect to what is done under powers incident to situations, that there is a wide difference between indulging to situations a latitude touching the *extent of power* and touching the *abuse* of it. Cases may be put of situations so critical that the power ought to be unbounded; but it is impossible to state a case where it is necessary that it should be abused; and it is the felicity of those who live under a

free constitution of government that it is equally impossible to state a case where it can be abused with impunity."

The defendant then brought a writ of error in the Exchequer Chamber, before which the case was re-argued. The opinion of the Chamber was reported to the Lord Chancellor, who, in accordance with its purport, reversed the judgment of the Court of Exchequer. The following are the reasons upon which the Opinion of Lord *Mansfield* and Lord *Loughborough* was founded:—

Opinion:—That this is not like an action of trespass, which supposes that something manifestly illegal has been done. Here it is for the ordering of a prosecution, which upon the stating of it, is manifestly legal.

The charges against the plaintiff before the court-martial were formally two, but in reality only one, viz, disobedience to the defendant's orders. The court-martial found that the orders were disobeyed, but that the plaintiff was justified in disobeying by the physical impossibility of carrying them out. A subordinate officer must not judge of the danger, propriety, expediency or consequence of the order he receives: ~~he must~~ obey. Nothing can excuse him but physical impossibility. The orders were given, heard and understood, and were not obeyed. In our opinion, in law the defendant had a probable cause to bring the plaintiff to a fair and impartial trial.

The important question now brought to judgment for the first time is, whether the present action can lie?

The occasion has often arisen where men of the fleets put upon their trials before a court-martial have thought the charge without a probable cause, and have warmly felt the injury of such an act of malice or oppression. Yet till this experiment it never entered into any man's head that such an action as this could be brought, consequently there is no usage, precedent or authority in support of it.

This case stands upon its own special ground.

By the sea military code all men of the fleet may be tried for any offence against his duty by a court-martial. By this

code a commander-in-chief has discretionary power to arrest, suspend and put any man of the fleet upon his trial. A court-martial alone can judge of the charge. But this military law hath foreseen that, though it is necessary to give superiors great discretionary power, it may be abused to oppression, and therefore it has provided by Art. 33 that a commander who arrests, suspends and put a man on his trial without a probable cause is guilty within that article; but the same jurisdiction which tries the original charge must try the probable cause, which, in effect, is a new trial.

The salvation of this country depends upon the discipline of the fleet. . . . Commanders in a day of battle must act upon delicate suspicions, upon the evidence of their own eye; they must give desperate commands; they must require instantaneous obedience

A military tribunal is capable of feeling all those circumstances, and understanding that the first, second and third part of a soldier is obedience. . . . But what condition will a commander be in if, upon the exercising of his authority, he is liable to be tried by a common-law judicature?

If this action is admitted, every acquittal upon a court-martial will produce one.

The person unjustly accused is not without his remedy. He has the properest among military men. Reparation is done to him by an acquittal, and he who accused him unjustly is blasted for ever and dismissed the service. These considerations incline us to lean against introducing this action. But there is no authority of any kind either way; and there is no principle to be drawn from the analogy of other cases. . . . Therefore it must be owned the question is doubtful, and when a judgment shall depend upon a decision of this question, it is fit to be settled by the highest authority. According to our opinion it is not necessary to the judgment in this cause. Because, supposing the action to lie, we think judgment ought to be given for the defendant.

Note—This case is frequently incorrectly cited as an authority for the doctrine of Superior Orders. Sutton was charged with disobeying a lawful order and was acquitted on the ground that the order was physically impossible of performance or was a foolish one involving his ship in disaster. The mere disobedience of a lawful order was found by Lords *Mansfield* and *Loughborough* to be a sufficient probable cause for the arrest of the plaintiff, and consequently no action would lie; the reversal of the judgment of the Court of Exchequer must be taken to have proceeded on that ground.¹ Their Lordships did not expressly declare that such an action would not lie under other circumstances.

Lush, J., said, in *Dawkins v. Paulet*,² that he regarded the judgment in this case as of high authority, although the ultimate decision was based upon independent grounds; that every year since Acts have passed for the government of Army and Navy without any intimation of a contrary view on the part of the Legislature, the judgment stands unassailed, one which has received the tacit assent of the Legislature and the profession.

Dawkins v. Lord Rokeby.

45 *L. J. Q. B.* 8; 4 *F. & F.* 806; *L. R.* 8 *Q. B.* 255;
L. R. 7 *H. L.* 744. (1866.)

Case.] There were *two* actions arising out of the same matter by a military officer against a superior officer.

The *first* was an action for false imprisonment and malicious prosecution before a court of inquiry, and conspiring with others to cause the plaintiff's removal from the Army—tried in 1866.

Judgment.—*Willes*, J., non-suited the plaintiff on the ground that no cause of action in a civil Court had been shown. The matter had been discussed and disposed of by the military authorities. Persons who enter into the military state become subject to military rule and discipline, and must abide by them.

The *second* was an action for libel and slander on the

¹ See *Warden v. Bailey*, 4 Taunt. 89.

² *L. R.* 5 *Q. B.*, at p. 122; 39 *L. J. Q. B.* 53, 21 *L. T.* 584, 18 *W. R.* 336, v. also *L. R.* 8 *Q. B.*, at p. 271.

ground of Lord Rokeby's evidence before the Court of inquiry held as to Col. Dawkins' conduct, and was tried before *Blackburn*, J., who directed the jury that the action did not lie, on the ground that the statements complained of were made by a military officer in the course of an inquiry into military matters, even though the plaintiff should prove that the defendant had acted *mala fide* and with actual malice, and without any reasonable and probable cause

Upon a writ of error this direction was approved by a Court of ten Judges in the Exchequer Chamber—judgment being delivered by *Kelly*, C B.

A Court of inquiry is a court duly and legally constituted, and recognised in the Articles of War and in many Acts of Parliament. And the principle is clear that no action of libel or slander lies against Judges, counsel, witnesses, or parties for words spoken in the ordinary course of any proceeding before any court recognised by law.

Upon appeal to the House of Lords (May 5, 1874) the opinion of the Judges was taken, and the judgment *affirmed*.

Note—In 1869 Col Dawkins brought an action against Lord Paulet¹ for the report made in the course of his duty to the Adjutant-General, declaring the plaintiff to be unfit for command, etc. The plaintiff by replication alleged actual malice and *mala fides*. *Mellor* and *Lush*, JJ, held the replication bad; no action will lie against a military officer for an act done in the ordinary course of his duty, even if done maliciously or without reasonable cause. *Cockburn*, C J, dissented, and held the replication good; *Sutton v Johnstone* had proceeded on the ground that there was reasonable and probable cause of arrest; and in that case Lord *Mansfield* expressly said, "there is no authority either way." *Dawkins v Rokeby* (this being of course only the earlier action of 1866) was the other way, but was a single *nisi prius* judgment.

Then in the *second* action against Lord Rokeby in 1873, the Court of Exchequer Chamber, after referring to the C J's opinion, observes² that "it is satisfactory to us to feel that the general question

¹ L R 5 Q B 94, 39 L J Q B 53; 21 L T 584, 18 W R 336

² L R 8 Q B at p 272

of privilege as applied to communications between military authorities upon military subjects . is yet open to final consideration before a Court of the last resort "

When the question did eventually come before the House of Lords it was settled against the view taken by *Cockburn*, C J

The principle that the civil Courts cannot be invoked to redress grievances arising out of military duties between persons both subject to military law was clearly affirmed by *Lush*, J , in *Dawkins v. Lord Paulet*, and approved by the Court of Appeal in *Marks v Frogley*.³

Cases such as *Sutton v. Johnstone* and *Dawkins v. Lord Rokeby*, where the acts complained of arose out of military duty, must be distinguished from cases where there is no colour for alleging that the grievance arose in the course of such duty The mere fact that both the plaintiff and the defendant were in the military service of the Crown will not affect the power of a civil Court to adjudicate upon the matter in dispute ⁴

In this connection the cases of *Fraser v Hamilton* (1917), 33 T. L. R. 431, and *Fraser v Balfour* (1918), 87 L. J. K. B. 1116, should be consulted In both the Court of Appeal held that there was no cause of action, and that even if the act complained of was malicious, this did not confer jurisdiction upon the Court Upon appeal to the House of Lords in the latter case, Lord *Finlay*, C, pointed out that the cases of *Grant v. Gould*, *Sutton v. Johnstone*, *Re Marsbèrgh* (30 L. J. Q. B. 296), *Keighley v. Bell* (4 F. & F. 763), *Barris v. Keppel* (2 Wilson, 314), *Dawkins v. Rokeby*, and *Dawkins v. Paulet* are all authorities to show that cases involving questions of military discipline and military duty only are cognisable only by a military tribunal, and not by a civil Court. That decision was affirmed by the House of Lords, but it did not affirm the other and wider proposition, that military wrongs arising from a malicious exercise of authority are not cognisable in a Court of law. "That question," said Lord *Finlay*, "is still open, at all events in this House. It involves constitutional questions of the utmost gravity."

In an exhaustive judgment, Mr Justice *McCardie*, in *Heddon v Evans*, 35 T. L. R. 142, reviewed the authorities, and came to the following conclusions (1) That a military tribunal or officer will be liable to an action for damages if, when acting in excess of, or without jurisdiction, they or he do or direct that to be done to another military man, whether officer or private, which amounts to assault, false

³ [1898] 1 Q. B., at p. 899, 67 L. J. Q. B. 605; 78 L. T. 607, 46 W. R. 548.

⁴ *Warden v Bailey*, 4 Taunt. 67.

imprisonment, or other common-law wrong, even though the injury inflicted purport to be done in the course of actual military discipline.

(2) That if the act causing the injury to person or liberty be within the jurisdiction and in the course of military discipline, no action will lie upon the ground only that the act has been done maliciously and without reasonable and probable cause. Applying these principles, the learned Judge held that the defendant had jurisdiction to order the plaintiff into military custody, and had not exceeded his powers in causing him to be confined at Fulford Detention Barracks.

LIABILITY OF OFFICERS TO THE PUBLIC.**Madrazo v. Willes.**22 *R. R.* 422; 3 *B. & A.* 353. (1820.)

Case.] This was an action brought against the captain of a British man-of-war by a Spanish subject for the wrongful seizure on the high seas of a ship employed by him in carrying on the African slave trade, together with her cargo of 300 slaves. The plaintiff was not forbidden to carry on this trade by the laws of his own country.

At the direction of *Abbott*, C J. [Lord *Tenterden*], the jury assessed the damages for ship and slaves separately, as the Judge at first doubted whether damages could be recovered in an English Court for loss in the prosecution of a trade here declared unlawful.

Upon the argument of a rule to reduce the damages accordingly, the Court, *Abbott*, C.J., *Bayley*, *Holroyd*, and *Best*, JJ., decided in favour of the plaintiff

Held.:—That the plaintiff was entitled to recover damages for seizure of the slaves, of which he was legally possessed by the laws of his own country. It would have been otherwise if the slave trade had been forbidden by his own country, or the general law of nations.

Buron v. Denman.76 *R. R.* 554; 2 *Ex.* 167. (1848.)

Case.] The plaintiff, who was a Spaniard, and not a subject of the Queen, was by the law of his own country legally possessed of slaves on the west coast of Africa. The defendant was captain of a man-of-war, who had proceeded to the

Gallinas to release two British subjects there detained as slaves. He then concluded a treaty with the native king for the abolition of the slave trade in his country, and in execution of the treaty fired the plaintiff's premises and carried away and released his slaves.

The defendant's proceedings were afterwards approved by the English Government.

The case was tried at Bar before *Parke, Alderson, Rolfe, and Platt*, BB.

Held.—First, that the plaintiff had a property in his slaves and might maintain trespass for their seizure, the slave trade not being piratical by the law of nations and it not appearing that Spain had passed any law abolishing the slave trade. Secondly, that the ratification of the defendant's act by Ministers of State was equivalent to a prior command. This act by adoption became the act of the Crown and consequently the seizure of the slaves and goods by the defendant was a seizure by the Crown, and an act of State for which the defendant was not responsible. "Whether the remedy against the Crown is to be pursued by a petition of right," said *Parke, B.*, "or whether the injury is an act of State without remedy, except by appeal to the justice of the State which inflicts it, or by application of the individual suffering to the Government of his own country, to insist upon compensation from the Government of this—in either view the wrong is no longer actionable "

The case was ultimately settled on terms.

Note —Although the slave trade was declared illegal by most maritime States, notably by Great Britain in 1807, by the United States in 1808 and by the Congress of Vienna in 1815, it was not until the Berlin Conference of 1885 that it was declared to be contrary to the law of nations by the Great Powers of Europe and the United States, as well as many minor Powers. See *Pitt Cobbett's Leading Cases on International Law*, I., pp 302—5 (4th ed. by Bellot).

SUPERIOR ORDERS.

Rex v. Thomas.

4 *M. & S.* 442; 16 *R. R.* 520; *Russell on Crimes*, 1,
p. 774. (1815.)

Case.] During time of peace, Thomas, acting as a sentinel on board H M S Achilles, lying in the Medway, received orders from his superior officer to keep off all boats unless they contained officers in uniform or unless the officer on deck allowed them to approach. A number of boats pressed on the ship and Thomas repeatedly warned them to keep off. One, however, persisted and came close under the ship. Thomas then fired at a man in the boat and killed him. He was indicted for murder.

Judgment.—The prisoner was tried at the Kent Assizes before *Bayley, J.*, at nisi prius and was found guilty, but the jury found that the prisoner fired under the mistaken impression that it was his duty. On a case reserved the Judges were unanimous that the killing was nevertheless murder; but were of opinion that if the act had been necessary for the preservation of the ship, as if the deceased had been stirring up mutiny, the sentinel would have been justified. Thomas received the King's pardon.

Keighly v. Bell.

4 *F. & F.* 763 (1866).

Case.] The plaintiff, Captain Keighly, was arrested and imprisoned in India by the order of Major-General Bell under orders from the Government. The plaintiff contended that these orders had been procured by means of reports or representations of a malicious nature by the defendant or for some

sinister and improper motive and without any reasonable or probable ground.

Judgment—In holding that there was no evidence of any such bad motive or of absence of any reasonable ground, *Willes, J*, laid down the general principle that “a soldier acting honestly in the discharge of his duty—that is, acting in obedience to the orders of his commanding officers—is not liable for what he does unless it be shown that the orders were such as were obviously illegal.” “I believe,” said the learned Judge, “that the better opinion is that an officer or soldier acting under the orders of his superior—not being necessarily or manifestly illegal—would be justified by his orders ”

Reg. v. Smith.

17 Cape of Good Hope Rep. 561. (1900.)

Case.] During the South African War, Smith formed one of a patrol which left Naapoort in November, 1899, under the command of Captain Cox for the farm Jackalsfontein in order to arrest certain occupants of the farm who were suspected of being about to join the enemy. On the approach of the patrol a messenger was seen riding off at a great pace in the direction of the enemy. The position of the patrol was therefore one of danger and time was of the utmost importance in the execution of its object. One of the occupants of the farm, having been arrested, a second bridle for his horse was required. Cox ordered Dolby, a farm servant, to fetch a bridle, being satisfied Dolby knew where it was to be found. Dolby failing to produce the bridle, Cox ordered Smith to “drill a hole in him” if he did not produce it at once. Dolby apparently turned obstinate and did nothing. Thereupon Smith shot him. Smith was indicted of murder and the case was sent for trial before a Special Court established under the Indemnity and Special Tribunals Act, for the trial of offences committed by soldiers and civilians during the war.

Judgment.—In delivering the judgment of the Court, consisting of three civilian Judges, *Solomon, J.*, said that on the one side it has been argued that absolute, implicit and unquestioning obedience is required. This was a rule of law the Court could not adopt in the present case. A soldier is responsible by military and civil law, and it was monstrous to suppose that a soldier would be protected where the order was grossly illegal. The Court could not therefore decide that a soldier is bound to obey any order which may be given.

On the other side, it had been argued that a soldier is only bound to obey lawful orders and is responsible if he obeys an order not strictly legal. This was an extreme proposition which the Court could not accept. Under the Army Act a soldier is only responsible for disobedience if the order given him is a lawful order, but at the same time for the protection of the private soldier it goes a good deal further. Although he is only bound to obey lawful orders, he is protected in obeying some orders not strictly legal. "If in any doubtful case," continued the learned Judge, "a soldier were entitled to judge for himself, to consider the circumstances of the case and to hesitate in obeying the order given him, that would be subversive of all military discipline. One must remember, especially in time of war, that obedience to orders is required from a private soldier, and that it is not desirable that a soldier should be encouraged to question the orders given him by his superiors in cases where there is some doubt whether the order is lawful or not. It is clear that we cannot adopt as a rule either of these two extreme propositions."

The rule laid down in the Manual of Military Law was therefore adopted, viz., that "if the command were obviously illegal, the inferior would be justified in questioning or even in refusing to execute it; as, for instance, if he were ordered to fire on a peaceable and unoffending bystander. But so long as the orders of the superior are not obviously and decidedly in opposition to the law of the land or well-known and established customs of the Army, they must meet with prompt,

immediate and unhesitating obedience." And the *obiter dictum* of Mr. Justice Willes in *Keighly v. Bell* to the effect that "an officer or soldier acting under orders from his superior which are not necessarily or manifestly illegal would be justified," was approved.

"I think," said Mr. Justice Solomon, "it is a safe rule to lay down that if a soldier honestly believes that he is doing his duty in obeying the commands of his superior, and if the orders are not so manifestly illegal that he must or ought to have known that they were unlawful, the private soldier would be protected by the orders of his superior officer."

Satisfied that the order given by Cox was not so plainly illegal that Smith would have been justified in refusing to obey it, the Court held that Smith was protected in carrying out the order to shoot Dolby if he did not get the bridle. Smith was accordingly found not guilty.

Note.—This decision was followed in *Kaplan v. Hanekem*, 20 C. G. H. Rep. 53, and *Rex v. Burns*, 19 C. G. H. R. 477. Just as *Danby's Case* went to establish the principle that even a Minister of the Crown cannot shelter himself by a plea of obedience to the express command of his Sovereign, so these cases show that a soldier or officer cannot plead the orders of his superior officer or of the Government to an action of trespass or to a criminal charge, if such orders were so manifestly contrary to the law of the land that he must or ought to have known that they were illegal. By the Mutiny Acts and by the Articles of War a soldier is only bound to obey *lawful* orders. The word "lawful" is not a chance expression. Under the Military Code of 1715, "every officer and soldier who should refuse to obey the military orders of his superior officer" was liable to the death penalty. At this period the Army was under the personal command of the Sovereign. This situation was declared by the House of Lords "to be a violation of the fundamental laws of the realm, whereby commands or orders of the Crown are bound and restrained within the compass of the law, no person being obliged to obey them if illegal, but punishable by the law should he do so." The Mutiny Act of 1749 was accordingly amended by the addition of the word "lawful," and every subsequent Mutiny Act and Articles of War contain the phrase "lawful command or order."

The principle is the same in international law, and has recently been accepted by the signatory Powers to the Washington Treaty of 1922. It is just as fundamental in international law as in municipal law. If once repudiated it is the negation of all law ¹

In *Clark v McGrath*, The Times, April 19, 1919, the plaintiff was a civil engineer employed by the Ministry of Munitions in the Mechanical Warfare Department at Oldbury. He was arrested on a charge of improperly taking photographs of tanks under construction, and was detained in custody. He sued the defendants for damages for assault, false imprisonment and slander. On the issue of slander the defendants pleaded privilege and justification, and on the issue of arrest that they acted under the general instructions of the Ministry of Munitions. *Rowlatt*, J., held that the defendants had acted wrongfully, and gave judgment for the plaintiff for £10 damages with costs.

¹ Pitt Cobbett's Leading Cases on International Law, II, pp 176—180, 4th ed., 1924, by Bellot.

NOTE VII.—THE LIABILITY OF OFFICERS—NAVAL AND MILITARY.

Some degree of protection to the persons responsible for the performance of duties imposed upon them by the Executive is necessary, to induce them to undertake the performance of those duties, and to secure their regular and uninterrupted working

This protection must be two-fold—first against their own subordinates, and secondly against the general public.

1 No officer is responsible to strangers for any injury done to them in the regular and proper discharge of his duties, or arising out of his pursuing the lawful instructions of his superiors, or where his superiors have ratified his acts. This is illustrated by *Buron v Denman* (*supra*, p 140). In *Nicholson v. Mouncey*,¹ a sloop of war had run down the plaintiff's vessel, while the sloop was under the defendant's command, although at the time of the collision the ship was under the navigation of the lieutenant. The captain was held not liable, since he was not in the ordinary position of the master of a vessel, and the lieutenant was in no sense his agent or servant. An officer, however, who is actually negligent in such a case is personally responsible in damages. See, *e.g.*, *The Volcano*, 2 W. Rob 337.

The officer's immunity will not extend so as to cover any tortious act which takes place not in pursuance of the proper discharge of the officer's general or special duty. This is shown in *Madrazo v Willes*.² So it was suggested in *Tobin v. The Queen*³ that an action might lie against Captain Douglas, who had also destroyed a supposed slaver. And in *Nireaha Tamaki v. Baker* ([1901] A. C. 561, 576; 70 L. J. P. C. 66; 84 L. T. 633) it was held that an aggrieved person may sue an officer of the Crown for an injunction to restrain a threatened act purporting to be done in pursuance of an Act of Parliament, but really outside the statutory authority.

2. Prompt obedience is essential to the discipline and efficiency of the Services; and superior officers must often decide hastily. They must be guarded against excessive responsibility to their inferiors. It

¹ 15 East, 384; 13 R. R. 501.

² *Supra*, p 140

³ *Supra*, p 78

is settled, therefore, that an officer cannot be held liable in a civil Court for any act done in the discharge of his duty, even though it be alleged to be done maliciously and without reasonable cause. For this *Sutton v Johnstone* is the great authority. Though that case did not decide expressly that no action would lie for a malicious prosecution without reasonable cause, Lord *Mansfield* and Lord *Loughborough* expressed a strong opinion to that effect, and their view has been confirmed in the later cases of *Daukins v Lord Rokeby* and *Daukins v Lord Paulet*.

It is to be observed that the Services are governed by articles and regulations of their own, and the Courts will, as a general rule, refuse to inquire into purely military or naval matters. This was definitely established in *Daukins v Lord Rokeby*, by a decision of the House of Lords. The Articles of War prescribe rules for the "Redress of Wrongs," and officers must be considered to be bound by those rules.

In *Barwis v Keppel*⁴ the Courts refused to entertain an action in the case of a sergeant who alleged that he had been maliciously reduced to the ranks by the defendant, an officer in the Guards. The act had been done in Germany during war time, and the Court held that it had no jurisdiction—the King acting there by virtue of his prerogative.

In the more recent case of *Rex v The Army Council, Ex p. Ravenscroft*, [1917] 2 K B 504; 86 L J K. B 1087, in which Major Ravenscroft applied for a rule *nisi* for a *mandamus* to the Army Council commanding them to cause a court of inquiry to re-assemble to rehear his case, the Divisional Court refused to intervene. "In a matter affecting the discipline of the Army," said *Avory, J.*, "this Court cannot interfere by *mandamus*, prohibition, or *certiorari* at the suit of an officer or soldier with the proceedings of a military court of inquiry or with any action that may be taken by the Army Council."

⁴ 2 Wils 814

PROHIBITIONS.

Prohibitions del Roy (Case of Prohibitions).

12 Rep. 63 (vi. 280). (1607.)

Case.] The King was informed (apparently by Archbishop Bancroft), upon complaint made to him by the archbishop concerning prohibitions, that he had a right to take what causes he pleased from the determination of the Judges and to determine them himself.

To which *Coke*, C.J., answered, in the presence, and with the consent, of all the Judges of England:

That the King in his own person cannot adjudge any case, either criminal or betwixt party and party, and judgments are always given by the Court:

The King may sit in the King's Bench, but the judgments are always given *per curiam*; no king after the Conquest assumed to himself to give any judgment:

The King cannot arrest any man, for the party cannot have remedy against the King.

Note—Coke's statement that no king after the Conquest gave judgment is certainly not correct, and we must remember that the 12th Part of his Reports was not published by himself. Speaking of the Curia Regis, the well-known *Dialogus de Scaccario*¹ says, "*in qua ipse (Rex) in propria persona jura decernit*"; see also Pollock and Matland, *Hist. Eng. Law*, vol. 1, pp 134 *et seq*. What James wanted was to assert a right on the part of the Crown to decide questions in which two Courts were brought into collision, and thus to decide that the King's Bench could not prohibit the Ecclesiastical Courts²

¹ I iv; Stubbs, *Select Charters*, 176

² See Gardiner, 2 H. E. 35, 122

IMMUNITY OF JURORS.

Floyd v. Barker.

12 Rep. 28 (vi. 228). (1607.)

Case.] A grand jury of Anglesey had indicted William Price for murder, and he had been convicted and executed. One Floyd then proceeded by "bill" in the Star Chamber against Barker, the Judge of assize on the trial, and the grand and petty jurors.

The case was heard before *Popham*, C.J., *Coke*, C.J., the Chief Baron, the Lord Chancellor, and all the Court of Star Chamber, and it was—

Resolved :—That when a grand inquest (*i.e.*, grand jury) indicts one of murder or felony, conspiracy doth not lie against the indictors, even where the party is acquitted; and that *a fortiori* it does not lie where he has been convicted.

What a Judge doth as Judge of record ought not to be drawn into question in this Court or before any other Judge.

Note.—The reason of this is said *in loco* to be that the King himself is *de jure* to deliver justice to all his subjects, and because he cannot himself do it to all persons, he delegates his power to his Judges. Any cause of complaint, therefore, ought to be laid before the King himself (at p 25). Compare the *Earl of Macclesfield v. Starkey*, 1684¹; an action of *scandalum magnatum* against one of a grand jury for a conspiracy to make a malicious and libellous presentment.

In *The King v. Skinner*, 1772,² a justice of the peace was indicted for scandalous words to a grand jury, which was supported on the ground that the grand jury had no remedy by action, but Lord *Mansfield*, C.J., quashed the indictment, observing that though the words were extremely improper, neither party, witness, counsel, Judge,

¹ 10 St Tr. 1330.

² Lofft, 55.

or jury can be put to answer civilly or criminally for words spoken in office, although if such words amounted to a contempt of Court they might be punished as such

Bushell's Case.

Vaughan, 135; 6 St. Tr. 999. (1670.)

Case.] A jury had acquitted William Penn and William Mead at the Old Bailey Sessions, on a charge of preaching in a London street, and had been fined by the Recorder forty marks each for contempt in doing so, and in default committed. A *habeas corpus* was moved, and the return was that the prisoners had been committed for finding a verdict "contra plenam et manifestam evidentiam, et contra directionem curiæ in materia legis."

Judgment—Per *Vaughan*, C J.:—The return is insufficient, for it gives the Court no opportunity of forming their own judgment as to the sufficiency of the evidence. Nor is the Court bound to accept the opinion of the Sessions Court, for Judges' decisions are constantly reversed. Then (1) the jury may have evidence before them that the Judge has not, as they are entitled to make use of their own personal knowledge by which they may be assured that what is deposed in Court is absolutely false, but to this the Judge is a stranger; (2) in any case they do not find the law, and therefore cannot return a verdict "contra directionem curiæ in materia legis." Without a previous finding as to the facts the Judge cannot direct, in matter of law, and he only knows the facts from the determination of the jury. In such a case as this a writ of attainder would either lie against the jury for a false verdict or it would not. If it did that was clearly the proper and only way for punishing them, as a fine would not bar the attainder and they could not be punished twice for the same offence. If, on the other hand, an attainder did not lie (and he was of opinion it did not), it was clearly because a jury could not be

punished in a criminal case for not finding according to the evidence and the Judge's direction.

Held —That finding against the evidence, or direction of the Court, is no sufficient cause to fine a jury.

Note —A writ of attaint was a process by which the verdict of a jury in a civil cause might be reversed by a subsequent trial before twenty-four jurors. If the first verdict were set aside the jury who found it were punished by imprisonment and the forfeiture of all their property, or at a later date by a pecuniary fine. This proceeding had its origin in times when jurymen were considered as giving their verdict from their own pre-existing knowledge of the matter in dispute, rather than from the evidence of others given in their presence. If, therefore, they returned a perverse verdict, contrary to what was notorious in their neighbourhood, they were looked upon as having committed wilful perjury and as deserving severe punishment. The writ of attaint, having long become obsolete, was abolished by 6 Geo 4, c 50, s 60.

It has been stated that the writ of attaint applied only to civil actions, and this seems the better opinion, although Hale (2 Hale, P. C 310) speaks of the matter as being in some doubt, and 6 Geo 4, c 50, s. 60, appears to countenance the view that the King might have an attaint. But in criminal cases a practice undoubtedly arose in the sixteenth century of fining jurors who found verdicts of acquittal against manifest evidence and the directions of the Judge. It was often protested that the practice was illegal, but it must be admitted that in *Bushell's Case* the Recorder had only followed the course frequently taken by Judges of the superior Courts, more especially it would appear by *Kelyng*, C J., who only five years previously had fined a jury at the Old Bailey 100 marks each for what he considered a perverse verdict of acquittal (see *Kelyng's Crown Cases*, ed. 1873, pp 69 *et seq.*)

In 1667 the House of Commons took the Chief Justice's conduct in fining juries into consideration, and resolved "that the precedents and practice of fining or imprisoning jurors for verdicts is illegal." *Bushell's Case* followed in 1670, and the practice of punishing jurors for their verdicts was finally stopped.

RIGHT TO A JURY.

*Ford v. Blurton. Ford v. Sauber.*38 *T. L. R.* 801. (1921.)

Case.] These were appeals by the defendants from orders made by *Swift*, J., reversing the decision of a Master, who had ordered that the actions should be tried with a Judge and jury. These actions were brought under section 2 of the Gaming Act, 1835, to recover the proceeds of cheques paid in respect of betting transactions. Upon the expiration of the Juries Act, 1918, the provisions of the Administration of Justice Act, 1920 (10 & 11 Geo. 5, c. 81), came into operation. The effect of those provisions is that, if the action is not one of those enumerated in Order 36, r. 6, viz., slander, libel, false imprisonment, malicious prosecution, seduction, breach of promise, an order for trial without a jury may be made if the Court or a Judge is satisfied on an application made by either party that the action or matter cannot as conveniently be tried with a jury as without a jury.

Judgment.—"If," said *Bankes*, L.J., "matters are to remain in their present position, it is clear that any *right* to a jury in an action in the King's Bench Division, except in the enumerated cases, is abolished." He trusted the question whether the right to a trial by jury was not sufficiently important to be restored and maintained, subject to exceptions to be precisely indicated, would be considered. To leave such a matter to the uncontrolled discretion of a Judge was not the best way of determining it. Uniformity of practice was not likely to result under such conditions. "Trial by jury," said *Atkin*, L.J., "is an essential principle of our law. It has been the bulwark of liberty, the shield of the poor from the

oppression of the rich and powerful. Anyone who knows the history of our law knows that many of the liberties of the subject were originally established and are maintained by the verdicts of juries in civil cases. Many will think that at the present time the danger of attack by powerful private organisations, or by encroachments of the executive, is not diminishing. It is not without importance that the right now taken away is expressly established as part of the American Constitution." He was not prepared to speculate what the precise limitations in the minds of the Legislature were, and though he had serious misgivings whether the Court was correctly interpreting the real intention of Parliament, he was unable to put any other meaning upon the words than that adopted by the other members of the Court. The appeals were dismissed with costs

Note—The provisions giving this arbitrary power to a Judge to refuse a jury would appear to be in line with the other numerous acts of both Parliament and the Executive in overriding without any mandate from the electorate the fundamental rights of the subject. Under the American Constitution this would be impossible, and if the old principle of the English common law that even an Act of Parliament cannot deprive the subject of his fundamental rights under the Constitution were restored, it would be impossible in the United Kingdom. This principle the New England colonists carried with them across the Atlantic, and it is embodied in the Constitution of the United States. In the above case *Atken*, L.J., doubted whether the rule issued under the statute was valid

IMMUNITY OF JUDGES.

Hamond v. Howell.2 *Mod.* 218 (*cp.* 1 *Mod.* 119, 184). (1678.)

Case.] The plaintiff had been one of the jury on the trial of Penn and Mead,¹ and had been committed. He now brought an action of false imprisonment against the Recorder of London, the Mayor, and the whole Court at the Old Bailey.

The case was argued before *Vaughan*, C.J., and the Court of Common Pleas. But the whole Court were of opinion that the bringing of this action was a greater offence than the fining of the plaintiff and committing him for non-payment; the Court had jurisdiction of the cause . . . they thought it to be a misdemeanour in the jury to acquit the prisoners, which in truth was not so, and therefore it was an error in their judgments, for which no action will lie.

Held —That an action will not lie against a Judge for what he doth judicially though erroneously.

Anderson v. Gorrie and others.[1895] 1 *Q. B.* 668; 71 *L. T.* 382.

Case.] This action was brought against three Judges of the Supreme Court of Trinidad and Tobago for damages for acts done by them in the course of certain judicial proceedings, the plaintiff alleging that these acts were done maliciously, without jurisdiction, and with knowledge of the absence of jurisdiction. The principal act complained of was that the plaintiff, having been summoned before the defendant Cook

¹ *Cp. Bushell's Case*, p. 151, *ante*

to be examined as to his means of satisfying certain judgments, and the summons having been adjourned, that defendant, under certain rules of Court made in pursuance of a colonial statute, ordered him to find bail in £500 and in default of so doing the plaintiff was committed to prison.

The action was tried before Lord *Coleridge*, C J. Before the trial one of the defendants had died. At the trial the jury found in favour of the second defendant, but as regards the defendant Cook they found that he "had overstrained his judicial powers and had acted in the administration of justice oppressively and maliciously to the prejudice of the plaintiff and to the perversion of justice," and they assessed the damages at £500. Lord *Coleridge*, C J., directed judgment to be entered for the defendant Cook as, notwithstanding the verdict, he was of opinion that he was not liable. The plaintiff appealed.

The Court of Appeal (Lord *Esher*, M R., and *Kay* and *A. L. Smith*, L.JJ.) affirmed the judgment of the Lord Chief Justice. The judicial proceedings and the order complained of were clearly matters within the jurisdiction of the Court of which defendant was a Judge. Taking the findings of the jury to be true to the fullest extent the action will not lie against the defendant. For an act done by a Judge in his capacity of Judge, and in the course of his office, he cannot be made liable in an action, even though he acted maliciously and for the purpose of gratifying private spleen. If a Judge goes beyond his jurisdiction a different set of considerations arise.¹

Held —That no action lies for acts done or words spoken by a Judge in the exercise of his judicial office, although his motive is malicious and the acts or words are not done or spoken in the honest exercise of his office.

Note—In *Thomas v Churton*,² in 1862, *Cockburn*, C J, had stated that he was reluctant to decide, and would not do so until the question

¹ Questions of this kind are dealt with in the two following cases

² 2 B & S 475, 31 L J Q B 139, 6 L. T. 320.

came before him, that if a Judge abused his office by using slanderous words maliciously and without reasonable and probable cause he was not liable to an action. *Anderson v. Gorrie*, which, however, only followed several earlier cases, notably *Fray v. Blackburn*,³ must now be taken as finally settling the law on this subject. It is unfortunate, however, that it did not receive examination by the House of Lords.

Houlden v. Smith.

14 Q. B. 841; 19 L. J. Q. B. 170; 14 Jur. 598;
80 R. R. 415. (1850.)

Case.] This was an action of trespass for false imprisonment. The defendant, as County Court Judge, had ordered the plaintiff to be committed for contempt in not appearing before him upon a judgment summons. The plaintiff did not reside in the County Court district of which the defendant was Judge, but in a neighbouring district, and this was known to the defendant, who supposed, nevertheless, that he had authority. The statute under which the proceeding purported to be taken (9 and 10 Vict. c. 95, s. 98) only authorised the issue of such summonses by the County Court within the limits of which the party should then dwell or carry on business.

Held.—That the commitment being without jurisdiction, and made under a mistake in the law and not of the facts, the Judge was liable in trespass.

Note.—It may perhaps be contended that County Court Judges are, at any rate in most cases, now protected by 51 & 52 Vict. c. 43, s. 55 (the County Courts Act, 1888), which provides that, in any action against any person for anything done in pursuance of that Act, the warrant under the seal of the Court shall be deemed sufficient proof of the authority of the Court previous to the issuing of the warrant. See *Aspey v. Jones*, 54 L. J. Q. B. 98, 33 W. R. 217. In *Scott v. Stansfield* (1868), L. R. 3 Exch. 220; 37 L. J. Ex. 155; 18 L. T. 572; 16 W. R. 911, the defendant was also a County Court Judge. The defendant in his capacity as Judge, and while sitting in his Court, had said of the plaintiff, an accountant, that he was “a harpy preying on

³ 3 B. & S. 576, 129 R. R. 463.

the vitals of the poor " The plaintiff brought an action of slander, but upon demurrer it was—

Held—That no such action would lie, even where the words used by the Judge were alleged to have been spoken maliciously and without probable cause corruptly, and to have been irrelevant to the matter before him

This decision was contrary to the earlier cases In *Kendillon v. Maltby*, Car & Mar 409, Lord *Denman* said "I have no doubt in my mind that a magistrate, be he the highest Judge in the land, is answerable in damages for slanderous language, either not relevant to the cause before him or uttered after the cause is at an end "

Calder v. Halket.

3 Moo. P. C. C. 28; 50 R. R. 1. (1839.)

Case.] This was a case before the Privy Council, on appeal from the Supreme Court of Judicature, at Fort William, in Bengal. The plaintiff had been apprehended, by order of the defendant—who was a magistrate having jurisdiction over Asiatics only, and the plaintiff was a European—for supposed participation in a riot. He brought an action for assault and false imprisonment, and upon judgment being entered for the defendant by the Supreme Court, the plaintiff appealed. By statute (21 Geo. 3, c. 70, s. 24), the provincial magistrates in India have the same immunity from actions extended to them in respect of their judicial functions as Judges have in this country.

It was argued for the appellant that as the act in question was in excess of his jurisdiction, which extended only to natives, an action would lie

Judgment.—The plaintiff was bound to show that the Judge knew, or ought to have known, the defect of jurisdiction, but of this there was no evidence, as it was not shown that the defendant was at any time informed, or knew before, that the plaintiff was a European, or had such information as to make it incumbent upon him to ascertain that fact, and the appeal must on this ground be dismissed.

Held.—That a Judge is not liable in trespass for a judicial act, without jurisdiction, unless he had the knowledge, or means of knowledge of which he ought to have availed himself, of that which constitutes the defect of jurisdiction; and that it lies on the plaintiff to prove such knowledge or means of knowledge.

Note—See the observations upon this case in *Pease v Chayton*, 3 B & S 620; 32 L J. M C 121, 8 L T 613; 11 W R 563; 129 R R 483.

Day v. Savage.

Hobart's Rep. 85. (1615.)

Case.] This was an action of trespass for the seizure of a bag of nutmegs from a wharf called Rotherhithe, the property of the mayor, citizens and commonalty of the city of London, by a servant of the corporation, by way of distraint upon the refusal of the plaintiff to pay wharfinger dues. The plaintiff declared that he was a freeman, and that by a custom of the city all freemen were discharged from such dues. The defendant denied this, and declared that it was a custom of the city that when issue was joined upon any custom of the city, though the mayor, commonalty and citizens be parties to the action, the mayor and aldermen have used to certify to the justices the truth of such custom. The plaintiff said the issue ought to be tried by a jury and not by certificate.

Held.—That the custom was not to be tried by certificate, but by a jury, because—

(1) It was not properly a custom, but a kind of prescription, or in the nature of a prescription, and then clearly it was not within their custom;

(2) That it was no such custom as was within the reason or meaning of that peculiar form of trial by certificate that was granted and used in London;

(3) That it was against right and justice, and against

natural equity, to allow them their certificate wherein they are to try and judge their own cause.

It is the custom of London to certify their customs by the mouth of their Recorder into the King's Bench, and such customs are triable by jury if they come to issue in the King's Courts.

“By that which hath been said it appears, that though in pleading it were confessed, that the custom of certificate of the customs of London is confirmed by Parliament, yet it made no change in this case, both because it is none of the customs intended, and because even an Act of Parliament made against natural equity as to make a man judge in his own case, is void in itself, for *Jura naturæ sunt immutabilia*, and they are *leges legum*.”

Note —The maxim that no one ought to be judge in his own cause cited by Littleton, *Tenures*, § 212, and Coke Co Litt 141a, is doubtless derived from the civil law, viz —*Generali lege decernimus neminem sibi esse iudicem vel ius sibi dicere debere*, Code 111, s. 1. “It is of the last importance,” said Lord Campbell in *Dimes v Grand Junction Canal Co* (1852), 3 H L Cas 759; 88 R R 330, “that the maxim ‘No man is to be a judge in his own cause’ should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest.” And so it was unanimously held by the House of Lords that the decrees of Lord Chancellor Cottenham in favour of the canal company were voidable and must be reversed on the ground that he was a shareholder in the company.

NOTE VIII.—THE IMMUNITY OF JUDGES.

The law as to the civil and criminal irresponsibility of Judges is well settled. No Judge is liable to an action before any ordinary tribunal for any judicial act or omission—with one exception, the refusal of a writ of *habeas corpus* in vacation, expressly provided for in the Habeas Corpus Act.¹ A series of decisions from the time of Coke (in *Floyd v Barker*) to *Anderson v Gorrie and others*, establish that no action will lie against a Judge for acts done or words spoken in his judicial capacity in a Court of justice. And judicial acts are not only those done in open Court, but all those emanating from the legal duties of a Judge, as, for example, acts done in chambers.²

This doctrine has been applied not only to the superior Courts, but to the Court of a coroner, and to a court-martial, which are not Courts of record. And it does not matter although malice and corruption be alleged, or want of reasonable and probable cause. Not even if the Judge exceeds his jurisdiction will he be liable to an action, unless the plaintiff can prove that he knew, or ought to have known, the defect of jurisdiction.

This rule has been established to secure the independence of the Judges and to maintain their authority. For this purpose they must be free from the liability to harassing and vexatious actions at the suit of discontented parties.

The decisions cover the cases not only of the Judges of the superior Courts, but also of the Court of the Vice-Chancellor of a University, an ecclesiastical Judge, a coroner, and a County Court Judge; nay, the principle has even been extended by analogy to the case of an arbitrator or referee,³ with, however, the limitation that he must have acted honestly.⁴

Magistrates or justices of the peace are not protected to the same extent. Their case is specially provided for by 11 & 12 Vict. cc 42—44

¹ 31 Car 2, c 2, s. 10.

² *Taaffe v Downes*, 3 Moo P. C. C., at p 60; 50 R. R. 14

³ *Pappa v Rose*, L. R. 7 C. P. 525 (Ex. Ch); 41 L. J. C. P. 187; 20 W. R. 784, 27 L. T. 348

⁴ *Stevenson v Watson*, 4 C. P. D., at p 158; 48 L. J. C. P. 318, 40 L. T. 485; 27 W. R. 682, *Chambers v. Goldthorpe*, [1901] 1 K. B. 624, 70 L. J. K. B. 482, 84 L. T. 444; 49 W. R. 401

(Jervis's Acts), and, speaking generally, an action will lie against them in either of two events

1 For an act done without jurisdiction

2 For an act done within their jurisdiction, but maliciously and without reasonable and probable cause.

Justices are, however, protected by many exemptions too numerous to mention here ⁵

What remedies, then, are provided in case of error or misconduct on the part of Judges?

For errors in law a remedy exists in an elaborate system of appeals. For actual misconduct on the part of Judges of the superior Courts, the constitutional remedies are by impeachment, or by removal on the address of both Houses of Parliament. Since the Revolution there has been only one instance of such an impeachment—the case of Lord Chancellor *Macclesfield* in 1725, though there have been several cases in which Parliamentary proceedings have been taken, in one of which a Judge was removed from office ⁶

The Judges of inferior Courts, however, are subject to the control of the King's Bench, and are removable for misbehaviour either by common law or by special statutes. The Lord Chancellor may remove a coroner ⁷ or a County Court Judge ⁸ for inability or misconduct.

A justice of the peace is subject to a criminal information for misbehaviour, he may also be discharged from the commission at the pleasure of the Crown.

⁵ On this subject see Broom on Constitutional Law, p 787, and Stone's Justices' Manual (39th ed.), p 914.

⁶ Until the Act of Settlement (12 & 13 Will 3, c 2, s 3) the Judges were removable at the pleasure of the Crown. By that Act it was enacted that the commissions of Judges should be made *quamdiu se bene gesserint*, but that upon the address of both Houses of Parliament it should be lawful to remove them. The first case in which such an address was proposed was that of Mr Justice Fox (an Irish Judge) in 1805. In 1828 Sir *Jonah Barrington* was, on an address, removed from the office of Admiralty Judge in Ireland. Abortive and unfounded proceedings were taken in the House of Commons in the cases of Lord *Abinger* (1843) and Sir *Fitzroy Kelly* (1867). The control exercised by Parliament over the judicial system will be found fully treated in 2 Todd, Parl Gov (ed 1869), 724—766 (c vi).

⁷ 50 & 51 Vict c 71, s 8, he may also be removed by any Court before which he has been convicted of extortion, or corruption, or wilful neglect of, or misbehaviour in, the discharge of his duty.

⁸ 51 & 52 Vict c 43, s 15.

IMMUNITY OF PARTIES, WITNESSES AND ADVOCATES.

Astley v. Younge.

2 Burr. 807. (1759.)

Case.] This was an action of slander and libel. The defendant was a justice of the peace, and had refused to grant a licence to one Day for a public inn. An application was then made to the Court of King's Bench concerning the refusal, and on this application the plaintiff made an affidavit in reference thereto. The defendant answered this affidavit by another, in which he alleged the plaintiff's affidavit to have been "falsely sworn."

The plaintiff thereupon brought his action, and the defendant demurred. The demurrer was argued before Lord Mansfield, C.J., and the Court, who "unanimously and clearly"—

Held.—That no action would lie against the defendant for words "only spoken in his own defence, and by way of justification in law, and in a legal and judicial way."

Note.—*Revis v Smith* (18 C B 126, 29 L J C P 195, 107 R R 236) was a similar action brought against a person who had been a defendant in a Chancery suit, and had in the course of the proceedings made an affidavit accusing the plaintiff in *Revis v Smith* of fraud. It was held that the action would not lie. See also *Henderson v Broomhead* (4 H. & N 569; 28 L J Ex 360; 118 R R 618). Upon somewhat similar grounds it was held that a letter of complaint with an affidavit of alleged charges attached, which was forwarded to the Incorporated Law Society for investigation by them, was so essentially a step in a judicial proceeding that no action could be founded upon any statement in either the letter or the affidavit—*Lilley v Roney* (61 L J. Q B 727). The same ruling was applied in the case of a written statement made by a medical man to a justice of the peace to whom an

application had been made for a reception order under the Lunacy Act, 1890, as the justice was acting judicially in the matter (*Hodson v Parc*, [1899] 1 Q B 455; 68 L J Q B 309, 80 L T 13) If, however, an affidavit containing scandalous matter, such as allegations of dishonesty, outrageous conduct, etc., not relevant to the issue, is filed in the High Court, the Court may order the affidavit to be taken off the file and the costs of the application paid by the person at fault. R S C, Ord 38, r 11 The same applies to a scandalous pleading, if the scandalous matter is irrelevant to the issue And if an affidavit is made extra-judicially, *ie*, not in any pending action or legal proceeding, it is in no way privileged (*Maloney v Bartley*, 3 Camp 210)

Seaman v. Netherclift.

2 C. P. D. 53 (*cp.* 1 C. P. D. 540).

46 L. J C. P. 128; 35 L. T. 784; 25 W. R. 159. (1876.)

Case.] This was an action of slander. The defendant, an expert in handwriting, had given evidence in a suit to establish a will in which he pronounced the signature to the will, of which the plaintiff was an attesting witness, to be a forgery. The genuineness of the signature was established, and the Judge made some disparaging observations on the defendant's evidence. Afterwards, in another proceeding on a charge of forgery, he was asked, in cross-examination, as to the observations of the Judge above mentioned. He answered the question, and having done so, he voluntarily added that he believed "that will to be a rank forgery" The plaintiff then brought the present action.

It was tried before *Coleridge*, C.J., and a verdict found for the plaintiff. On motion to enter judgment for the defendant, *Coleridge*, C.J., and *Brett*, J., decided in favour of the defendant.

The case went to the Court of Appeal (*Cockburn*, C.J., *Bramwell* and *Amplett*, L.JJ.), which

Held.:—That words spoken by a witness in the course of and having reference to a judicial inquiry are absolutely

privileged, whether those words are relevant or irrelevant to the matters in issue.

Munster v. Lamb.

11 Q. B. D. 588; 52 L. J. Q. B. 726; 49 L. T. 252;
32 W. R. 248. (1883.)

Case.] This was an action by the plaintiff against a solicitor for words spoken of the plaintiff by the defendant, while he was defending a client at petty sessions. The defamatory suggestion made by the defendant was unsupported by any evidence in the case.

At the trial the plaintiff was nonsuited by *Williams, J.* The Divisional Court refused to grant a new trial, and the plaintiff appealed.

The Court of Appeal, *Brett, M.R.*, and *Fry, L.J.*,

Held—That no action will lie against an advocate for words spoken in the course of a judicial proceeding, though they are spoken maliciously and without excuse, and are wholly irrelevant.

Note.—In cases of this kind where the statements of persons occupying a judicial position, of witnesses and of advocates are said to be absolutely privileged it is, as was pointed out by *Channell, J.*, in *Bottomley v. Brougham*, [1908] 1 K. B. 584; 77 L. J. K. B. 311, incorrect to say that the law gives anyone a privilege to be malicious. The true view is that in the public interest the law requires that the conduct of such persons, in the course of a legal proceeding, shall not be inquired into to see whether it is malicious or not, the object being that the independence of Judges, advocates, and witnesses may be fully secured.

If, however, an advocate uses words of a grossly improper and irregular nature in a Court of record, he may be punished by that Court for contempt (see *Ex p. Pater*, 5 B. & S. 299; 33 L. J. M. C. 142; 10 L. T. 376; 12 W. R. 823); and even a defendant in a criminal proceeding has been heavily fined for conducting his defence in a grossly improper manner (*R. v. Davison*, 4 B. & Ald. 329; 23 R. R. 295). See also as to a witness misconducting himself in the same way, L. R. 2 C. P. D. at p. 61

REPORTS OF PARLIAMENTARY PROCEEDINGS.

Wason v. Walter.

L. R. 4 *Q. B.* 73; 38 *L. J. Q. B.* 34; 17 *W. R.* 169;
19 *L. T.* 409. (1868.)

Case.] This was an action of libel against one of the proprietors of *The Times* newspaper, for a report of a debate in the House of Lords, in which statements had been made reflecting on the plaintiff.

There was another count in respect of a leading article on the debate.

The action was tried before *Cockburn*, C.J., who directed the jury, that if the matter charged as a libel in the first count was a faithful and correct report of the debate, the occasion was privileged, and that as to the second count a public writer is entitled to make fair and reasonable comments on matters of public interest.

The jury found for the defendant. A rule having been obtained for a new trial on the ground of misdirection, it was argued, and the judgment of the Court was delivered by *Cockburn*, C.J.

Judgment —The Court discharged the rule for a new trial. In the course of his judgment the Chief Justice observed that the principles on which the publication of reports of the proceedings of Courts of Justice have been held to be privileged apply to the reports of parliamentary proceedings. The analogy between the two cases is in every respect complete. It is of paramount public and national importance that parliamentary proceedings shall be communicated to the

public, who have the deepest interest in knowing what passes in Parliament. But a garbled or partial report, or a report of detached parts of proceedings published with intent to injure individuals will, as in the case of reports of judicial proceedings, be disentitled to protection. As to the count founded on the leading article, the direction to the jury was perfectly correct. Such comments are privileged if made upon a matter of public interest, with an honest belief in their justice and with such a reasonable degree of judgment and moderation as in the opinion of the jury to amount to a fair and legitimate criticism on the conduct and motives of the person censured.

Held.:—That a faithful report in a public newspaper of a debate in Parliament is not actionable at the suit of a person whose character may have been called in question in the debate; nor is a fair and honest comment upon a speech made in the course of such a debate. —

REPORTS OF JUDICIAL PROCEEDINGS, ETC.

Usill v. Hales.

3 C. P. D. 319; 47 L. J. C. P. 323; 38 L. T. 65. (1878.)

Case.] This was an action against the publisher for an alleged libel published in the *Daily News*, consisting of a report of an application made by three persons to a police magistrate for a summons against the plaintiff. The application was *ex parte*; the magistrate held that it only had relation to a matter of contract, and that he had no jurisdiction in the matter, and he referred the applicant to the County Court.

The action was tried before *Cockburn*, C.J., who directed the jury that the publication, if a fair and impartial report, was privileged. The jury found for the defendant.

The case was argued on an application for a new trial, and it was by *Coleridge*, C.J., and *Lopez*, J.,

Held.—That a fair and impartial report of a proceeding in a police court, even though it was an *ex parte* and preliminary proceeding, is privileged.

Note—Compare the case of *Lewis v. Levy*, 1858; (27 L. J. Q. B. 282; 113 R. R. 768; E. B. & E. 537) nearly to the same effect. In both these cases the Court followed and approved a much earlier authority, *Curry v. Walter* (1 Bos. & Puller, 525, 4 R. R. 717), in which it was held that an action was not maintainable against a newspaper proprietor for publishing a true account of an application to the King's Bench for an information against two justices for refusing to license an inn.

So far as newspaper proprietors are concerned they are now protected by statute as well as by the common law. The Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64, s. 3), enacts that "a fair and accurate report in any newspaper of proceedings publicly heard before any Court exercising judicial authority shall, if published contemporaneously with such proceedings, be privileged; provided that

nothing in this section shall authorise the publication of any blasphemous or indecent matter." By section 8 no *criminal* prosecution shall be commenced against any person responsible for the publication of a newspaper for any libel published therein without the order of a Judge at chambers

It will be seen that the above provisions only apply to reports appearing in newspapers. In *Kimber v. The Press Association* ([1893] 1 Q. B. 65, 62 L. J. Q. B. 152, 41 W. R. 17, 67 L. T. 515) an attempt was made to make the defendants, who were not newspaper proprietors, responsible for a report supplied by them of an *ex parte* application to justices for a summons against the plaintiff for perjury, but the Court of Appeal followed *Usill v. Hales* and *Curry v. Walter*, and held that the action was not maintainable, as although the justices had power to hear such an application in private, they had not done so.

The privilege extends to fair and accurate reports of the proceedings of all Courts while sitting in public; "for this purpose no distinction can be made between a Court of *pre-poudre* and the House of Lords sitting as a Court of justice," per Lord Campbell, C.J., in *Lewis v. Levy, E. B. & E.*, at p. 554; and see *Hodson v. Pare* [1899] 1 Q. B. 455; 68 L. J. Q. B. 309; 80 L. T. 13.

It would appear somewhat doubtful whether the Law of Libel Amendment Act, 1888, section 3, gives an absolute privilege in the case of newspaper reports, or whether, as in all cases of qualified privilege, the privilege can be rebutted by proof of express malice; see, as to this, Gatlley on "The Law of Libel and Slander" (p. 314). Before the Act it was held that even a true report of proceedings in a Court of justice was not privileged absolutely, and that if it were sent to a newspaper for publication from a malicious motive, an action would lie against the person so sending it. *Stevens v. Sampson*, 5 Ex. D. 53; 49 L. J. Q. B. 120; 28 W. R. 87, 41 L. T. 782.

The right to comment stands upon a different footing to the right to report. Many statements in reports of legal proceedings are defamatory and libellous in the highest degree, but they are protected by the law, if they are fair and accurate, on the ground that the occasion is privileged. But fair comment and criticism on matters of public interest, although they may be in severe terms, are really not libellous at all. The distinction was pointed out by Lord Esher, M.R., in *Merivale v. Carson*, 20 Q. B. D. at p. 280. Such comment only becomes libellous when it ceases to be what the law calls "fair," and whether it is fair criticism or not is a question for the jury. A man is entitled to entertain and express any opinion he pleases upon matters of public interest, however wrong, exaggerated, or violent it may be,

and it must be left to the jury to say whether the mode of expression exceeds the limit of fair criticism (per *Bouen*, L J, in *Merivale v Carson*, *supra*) Criticism of the conduct of a Judge in a judicial proceeding is permissible, but it must not be such as to be calculated to obstruct or interfere with the due course of justice (*Shipworth's Case*, L R 9 Q B 230), or to amount to personal scurrilous abuse of the Judge as a Judge (*R v Gray*, [1900] 3 Q B 36, 69 L J Q B 502, 82 L T 534, 48 W R 474), or the offender may be dealt with for contempt of Court

Davison v Duncan.

7 E & B 229, 26 L J Q B 104, 110 R R 572 (1857)

Case] This was an action for a libel contained in the report of the proceedings at a meeting of Improvement Commissioners to which the public were admitted The defendant demurred, alleging that the report was a true account, published without malice

The demurrer was heard before *Campbell*, C J, *Coleridge*, *Wightman*, and *Crompton*, JJ, and allowed

Held —That it has never yet been held that privilege extends to a report of what takes place at all public meetings

Note —The above case is retained as showing what was the law as to reports of public meetings before the statutory provisions set forth below, which have to a very great extent altered the law on the subject But it must be remembered that *Davison v Duncan*, followed and affirmed as it was by the Court of Appeal in the later case, *Purcell v Sowler*, 2 C P D 215, 46 L J C P 308, 25 W R 362, 36 L T 416, still applies to all reports except those published by newspapers, and also to newspaper reports of meetings other than those specified in the Act of 1888, and to cases where the defendant had not inserted a reasonable contradiction as provided by the Act

The Act referred to is the Law of Libel Amendment Act, 1888 (51 & 52 Vict c 64), by section 4 of which a fair and accurate report published in any newspaper of the proceedings of a public meeting, or (except where neither the public nor a newspaper reporter is admitted) of any meeting of a local authority (the various authorities are specified in the section), or any committee thereof, or of Royal Commissioners,

or select committees of either House of Parliament, or of justices at Quarter Sessions, and the publication at the request of any Government department, or police authority, of any notice or report issued for the information of the public, shall be privileged, *unless* published or made maliciously, provided that nothing in this section shall authorise the publication of any blasphemous or indecent matter, and provided also that the protection afforded by the section shall not be available as a defence if it shall be proved that the defendant has been requested to insert in the newspaper in which the report or other publication complained of appeared, a reasonable letter or statement by way of contradiction or explanation of such report or other publication, and has refused or neglected to insert the same, provided further that nothing in the section shall be deemed to limit or abridge any privilege by law existing, or to protect the publication of any matter not of public concern and the publication of which is not for the public benefit. For the purposes of this section the expression "public meeting" means any meeting *bona fide* and lawfully held for a lawful purpose, and for the furtherance or discussion of any matter of public concern, whether the admission thereto be general or restricted.

In *Chaloner v Lansdown & Sons* (1894), 10 T L R 290, the report was published in the *Wiltshire Times* of a sermon preached in a Congregational chapel in which the plaintiff was attacked. It was held that the chapel service was not a public meeting within section 4 of the Act of 1888. The jury found the report to be fair and accurate, but published maliciously. *Ponsford v Financial Times, Ltd* (1900), 16 T L R 248, was an action for libellous statements contained in a report in the *Financial Times* of a meeting of shareholders. In the chairman's speech unfounded charges of fraud were made against the secretary. These charges were held not to be of public interest, and consequently the report was not privileged. The question whether the matters complained of are of "public concern," and the publication thereof is for the public benefit, is for the Court. *Adams v Ward*, [1917] 2 A C 332, 86 L J K B 849.

OFFENCES AGAINST THE STATE—HIGH TREASON—COMPASSING THE DEATH OF THE KING, AND LEVYING WAR AGAINST THE KING

Rex v Thistlewood and others

88 *St Tr* 681 (1820)

Case] In this case (known as the Cato Street Conspiracy from the street off the Edgware Road in which the house where the conspirators met was situate) Arthur Thistlewood and ten other persons were indicted for compassing and imagining the deposition of the King, compassing and imagining the death of the King, compassing to levy war against the King in order to compel him to change his measures and councils, levying war against the King, and also for conspiring to kill divers members of the Privy Council, members of the Cabinet, when assembled for dinner at Lord Harrowby's house in Grosvenor Square. The prisoners were tried separately, and in his summing up to the jury *Abbott*, L C J said "Two of these charges, namely, compassing and imagining the death of His Majesty, and actually levying war against him, were declared to be treasons by a statute passed as long ago as the reign of Edward III. In the construction of that ancient statute it had been held, not only in many cases passing in judgment in our Courts, but also by the opinions delivered to us by grave and learned writers upon the law on that subject, that all conspiracies and attempts to depose His Majesty, and all conspiracies and attempts to levy war against him, were overt acts of a treasonable intention to take away his life, because, as experience shows us, the death of the sovereign generally follows his deposition. In order, however, to remove any mistake that

persons might fall into, a statute was passed in the reign of His late Majesty, similar in substance, and nearly so in language, to several statutes which had formerly been passed, but which operated for a season only, by which the compassing or imagining to depose His Majesty, or the compassing and imagining to levy war against him, or to compel him to change his measures and councils, were each declared to be a substantive treason. And as the evidence in this case points more directly to the compassing to depose and to levy war against him than to the actual intention to take away his life, the most simple way of presenting this case to you is to direct your minds to those parts of this indictment which charge the compassing and imagining to depose the King and to levy war against the King in order to compel him to change his measures and councils "

Thistlewood was found guilty on the third* and fourth counts, James Ings on the first and third counts, John Thomas Brunt on the third and fourth counts, and William Davidson and Richard Tidd on the third count. At the conclusion of these trials the remainder of the prisoners withdrew their former pleas and pleaded guilty. The former were hanged and afterwards beheaded, and the latter pardoned on condition of being transported beyond the seas.

In his direction to the jury in Brunt's case *Richards*, C B , said "The crime of high treason imputed by these counts consists in the imagination and intention, and that intention is to be proved by what are called overt acts, which are stated in the indictment, and if those overt acts or any material parts of them are proved to your satisfaction, there is no doubt but that they support the charge of high treason in each of these counts "

This was not, declared the learned Judge, a case of constructive treason. The conspiracy to destroy the Cabinet Council was admitted. "If, however, this terrible purpose was the only purpose which the conspiracy embraced, there was no high treason in it, because the object is confined to

the destruction only of those fifteen noble lords and gentlemen but it is contended that this particular purpose formed one of the steps to the general scheme of subverting the constitution "

Regina v Frost and others

9 Car & P 129 (1839)

Case] Frost and eleven other persons were indicted for high treason (1) by levying and making war against the Queen within the realm, and being armed did march in a warlike manner through divers towns, and did with 2,000 and more with offensive weapons beset houses and force persons to march with them, and did seize arms further to arm themselves to destroy the soldiers of the Queen and to levy war against the Queen within the realm, and thereby subvert the government and alter the laws by force, and did march into the town of Newport and make a warlike attack upon a certain dwelling-house, did fire upon the magistrates, soldiers and constables there assembled, and did attempt, and in warlike manner to subvert and destroy the constitution and government of this realm as by law established, (2) by levying and making war against the Queen within her realm (3) by compassing or imagining to depose the Queen, (4) compassing to levy war within the realm in order to compel the Queen to change her measures and councils

In his direction to the jury *Tindal*, C J , said " that it was essential to the making out of the charge against the prisoners that there must be an insurrection, that there must be force accompanying that insurrection, and the object of it must be of a general nature, and that it was not incumbent on the prisoners to show what was the object and meaning of the acts done, but that it was the duty of the prosecutors to make out their case against the prisoners " The prisoners were found guilty, Frost's sentence was commuted to transportation for life It is said in the head-note that if a person act as

the leader of an armed body who enter a town, and then object be neither to take the town nor attack the military, but merely to make a demonstration to the magistracy of the strength of their party, either to secure the liberation of certain prisoners convicted of some political offence, or to procure for those prisoners some mitigation of punishment, this, though an aggravated misdemeanour, is not high treason

Regina v Smith O'Brien and others

3 Cox C C 360 (1848)

Case.] The prisoners, who were indicted in five counts for levying war against the Queen in Ireland, and in a sixth for compassing the death of Her Majesty, on being arraigned, tendered pleas alleging that a copy of the indictment and list of witnesses and jury panel were not delivered to them ten days before the days of trial, and that they ought not now to be called upon to plead, because of such non-delivery, concluding with a verification, and praying judgment that they might not now be compelled to answer the said indictment. It appeared that copies of the indictment had been furnished five days before the days of trial, but the lists were not delivered at all. These pleas, having been demurred to by the prosecution, were overruled by the Court below. Found guilty of high treason and sentenced to death, the prisoners sent out writs of error to reverse the judgments and convictions of the Court below.

Held, by the full Court that the pleas were rightly overruled and that the prisoners were not entitled to a copy of the indictment more than five days before the trial or to a list of witnesses or jury panel at any period. Sections 1 and 4 of 57 Geo 3, c 6, did not extend to Ireland. Consequently persons prosecuted in Ireland are not entitled to the benefits conferred by 7 & 8 Will 3 c 3 and 7 Anne, c 21, on persons accused of high treason.

London Apprentices' Case

Anderson's Rep, pt 2, n 2, *Hale*, 1 P C 144 (1597)

Case] Divers apprentices of London and Southwark were committed to prison for riots, and for making proclamation concerning the price of victuals, some whereof were sentenced in the Star Chamber to be set in the pillory and whipt, after which divers other apprentices and one Grant of Uxbridge, conspire to take and deliver those apprentices out of ward, to kill the mayor of London and to burn his house and to break open two houses near the Tower, where there were divers weapons and arms for three hundred men, and there to furnish themselves with weapons, after which divers apprentices devised libels, moving others to take part with them in their devises, and to assemble themselves at Bun-hill and Tower-hill, and accordingly divers assembled themselves at Bun-hill, and three hundred at the Tower, where they had a trumpet and one that held a cloth upon a pole in lieu of a flag, and in going towards the lord mayor's house the sheriffs and sword-bearer with others offered to resist them, against whom the apprentices offered violence

And it was agreed by the Judges referees that this was treason within the statute of 13 Eliz c 1 for intending to levy war against the Queen, for they held, that if any do intend to levy war for anything that the Queen by her laws or justice ought or may do in government as Queen, that shall be intended a levying of war against the Queen, and it is not material that they intended no ill to the person of the Queen, but if intended against the office and authority of the Queen, to levy war, this is within the words and intent of the statute, and hereupon Grant and divers others were indicted and executed

Burton's Case

2 *Anderson's Rep* 66, *Hale* 1 P C 145. (1597)

Case] Divers persons were charged with conspiring to assemble themselves and moving others to rise and pull down inclosures, and to effect this they determined to go to Lord Norris's house and others', to take their arms, horses, and other things, and to kill divers gentlemen, and thence to go to London, where they said many would take their parts, and this appeared from their confessions

It was agreed (1) That this was treason within the statute of 13 Eliz c 1 for conspiring to levy war against the Queen, (2) But not within the statute of 25 Edw 3, st 2, because no war was levied and that statute extended not to a conspiracy to levy war If they had armed themselves and so assembled *more guerrino*, it had been a war levied, and by construction and interpretation a war levied against the Queen This applied also to the previous case

ADHERING TO THE KING'S ENEMIES

Rex v Vaughan

2 Salkeld, 684, 18 St Tr 525 (1696)

Case.] Vaughan was an Irishman, who took service with Louis XIV and commanded a small ship of war, the *Loyal Clancarty*, which preyed on English commerce. Vaughan claimed to have been born in Martinico and therefore a French subject. Upon the evidence he was probably born in Martinico of an Irish father and a French mother. But even if by the *lex soli* he were a French subject, by 25 Edw 3, st 2, he was British since his father was born within the realm and within the King's allegiance. The defendant was indicted for high treason in levying war against the King, and in adhering to the King's enemies *cum pluribus subditis gallicis inimicis domini regis*, and being there on the high seas, about fourteen leagues from Deal, within the jurisdiction of the Admiralty of England, did by force of arms assist the King's enemies and afterwards cruised within the said jurisdiction in order to take the King's ships by force.

The objection was taken for the defendant that the treasons alleged in the indictment must be proved by overt acts which must also be alleged in the indictment.

Held —That an indictment for levying war or adhering to the King's enemies generally, without showing particular acts or instances, is not good, for the words of the statute are "*and thereof be provably attainted by some overt deed*" and these words immediately follow the article of adhering. It would be a great violence to construe them to refer to the first article only and not to the last, to which they are thus connected. If they are to be restrained to a single article, it were more agreeable to the strict rules of construing to refer them to this of adhering only.

And if it be not a good indictment without special acts, etc, the question is whether those that are alleged ought not to be proved and no others

Per Holt, C J "A distinct overt act cannot be given in evidence unless it relate to that which is alleged or conduces to the proof of it But if it conduce to prove an overt act alleged, it is good evidence, as if consulting to kill the King be alleged, any acts or doings in pursuance of that consultation may be proved, for it proves their agreement and consent, and is a farther manifestation of the act alleged in the indictment "

Objections were also taken (1) that the seamen must be proved to be French natural-born subjects, for if they were Dutch they were not *subditi gallici*, (2) that though the defendant was alleged to adhere to the King's enemies, yet it was not alleged to be against the King, (3) that this was not a sufficient act of adhering without fighting or some act of hostility

Held —That if the States General be in alliance and the French at war with us and certain Dutchmen turn rebels to the States and fight under command of the French King they are *inimici* to us and *gallici subditi*, for the French subjection makes them French subjects in respect of all other nations but their own, and if such cruise at sea and an Englishman assist them he is a traitor, but not a pirate, for none are pirates who act under the command of a sovereign prince

Adhering to the King's enemies must of necessity be against the King, and therefore if an Englishman assist the French King, being at war with us, and fight against the King of Spain, who is an ally of the King of England, this is treason, as adhering to the King's enemies against the King, for the King's enemies are hereby strengthened and encouraged, and so is within the express words of 25 Edw 3, st 2, of adhering to the King's enemies, and it is sufficient to allege the treason in the words of the statute

•Cruising is a sufficient overt act of adhering, comforting and aiding, as if Englishmen would list themselves and march, this is sufficient without coming to battle, and there may be levying of war without actual fighting

Note —Since this was a common law charge of high treason upon the high seas it was tried by a special commission of the High Court of Admiralty, which sat in the Justice Hall at the Old Bailey, under 28 Hen 8, c 15 By section 1 of this Act "all treasons felonies robberies murders and confederacies hereafter to be committed in or upon the sea or in any other haven river creek or place where the Admiral or Admirals have or pretend to have power authority or jurisdiction shall be inquired heard determined and judged in such shires and places in the realm as shall be limited by the King's commission or commissions to be directed for the same in like form and condition as if such offence or offences had been committed or done in or upon the land, and such commissions shall be had under the King's Great Seal, directed to the Admiral or Admirals or to his or their Lieutenants, Deputy and Deputies, and to three or four such other substantial persons as shall be named or appointed by the Lord Chancellor of England for the time being from time to time and as oft as need shall require to hear and determine such offences after the common course of the laws of this realm and for treasons murders robberies and confederacies of the same done and committed upon the land within the realm "

Rex v Lynch.

[1908] 1 K B 444, 72 L J K B 167, 20 Cox C C 468

Case] Arthur Lynch, a British subject born in Australia, after the outbreak of war between Great Britain and the South African Republic went to Pretoria to act as war correspondent to certain French, English and American papers Upon his arrival in Pretoria he applied for letters of naturalization, and on January 18, 1900, in order to procure such letters he made a declaration that he was willing to take up arms in the service of the Republic, and took an oath of allegiance to the Republic He then entered the military

service of the Republic as commander of the 2nd Irish Brigade and took an active part in hostilities against the British forces both in the Transvaal and in Natal. He also published an address to Irishmen inciting them to take up arms for the Republic.

He was indicted for high treason under 25 Edw 3, st 2, by adhering to the Queen's enemies in the territory of the South African Republic, without the realm of England. It was contended for the prisoner that having become a naturalized citizen of the South African Republic he could not be guilty of treason by adhering to that government. He had ceased to be a British subject by virtue of the Naturalization Act, 1870, s 6.

Judgment — Lord Alverstone, C J, in his judgment drew a distinction between the first two overt acts and those subsequent. The first two acts, the declaration of willingness to take up arms and the taking the oath of allegiance, although they took place on the same day as the alleged grant of letters of naturalization (of which there was no evidence), in fact preceded it. The other overt acts were all deliberate acts of warfare and took place subsequently to the alleged grant. It was contended that section 6 of the Naturalization Act, 1870, entitled a British subject to become an alien and to throw off his allegiance to the Crown even in time of war. Even if that were so, it would afford no defence in respect of the first two overt acts, since by section 15 of the Act "Where any British subject has in pursuance of this Act become an alien, he shall not thereby be discharged from any liability in respect of any acts done before the date of his so becoming an alien." And it could not be seriously contended that the first two acts which formed the basis of the naturalization and without which naturalization could not, under the circumstances, have been obtained at all, were not "done before the date of his so becoming an alien" within the meaning of section 15. Further he was clearly of opinion that section 6 did not empower a British subject to become naturalized in

an enemy country during war, and that consequently the question of the prisoner's liability for the subsequent overt acts must also be left to the jury. Wills and Channell, JJ, concurred and it was accordingly held that section 6 did not empower a British subject to become naturalized in an enemy State in time of war, and that the act of becoming naturalized under such circumstances was no defence to acts of applying for letters of naturalization, making the declaration and taking the oath of allegiance, which were all acts of high treason.

In submitting that there was no evidence of an offence to go to the jury *Horace Ivory*, K C, contended that the statute deals with the case of a person who levies war against the King in his realm or is "adherent to the King's enemies in his realm giving them aid and comfort." That must mean one of two things, either that the accused, being in the realm, has been adherent to the King's enemies wherever they are, or that the enemies being in the realm, the accused has been adherent to them, wherever he is. Realm in the statute means England only, and the words "or elsewhere" applies to the enemies, not to the accused. The prisoner in this case was not within the realm, nor was the enemy. In *MacLane's Case*, 26 St Tr 722, it was held that the operation of the statute was extended to Canada by a colonial statute. In *Smith O'Brien's Case*, 7 St Tr (N S) 1, it was held that the statute was extended to Ireland by Poyning's Law. There was no statute extending the operation of the statute to Natal. In *Vaughan's Case* the indictment was not under the Statute of Treason. In *Weldon's Case*, 26 St Tr, at p 292, *Finucane*, J, said "The locality is annexed to the person adhering, not to the enemy to whom he adhered."

For the Crown Sir Robert Finlay, A-G, submitted that the statute had never been construed as applying only to acts committed in England. That adhering to the King's enemies outside the realm is treason was clear from the reference in 18 Geo 2, c 30. In *Mulcahy's Case*, L R 3 H L, 306,

Willes, J, in giving the opinions of the Judges in the House of Lords, treats the words 'or elsewhere' as applying to the whole clause. And this is the view of Coke, 3 Inst 10, 11, Coke upon Littleton, 261

The prisoner was found guilty and sentenced to death

Note—In *R v Pieterus* (1901), 22 Natal L R 167, the facts were similar. The prisoner had not completed his naturalization in the Transvaal before the outbreak of war. He was charged with adhering to the enemy, but although the adherence was outside Natal, no argument was raised on this point. He was convicted and sentenced to six months imprisonment and a fine of £500 and to a further twelve months in default of payment

Rex v. Ahlers

11 Cr App Rep 62 (1914)

Case] Ahlers was a German-born subject, naturalized in England in 1905 and acting, upon the outbreak of war with Germany on August 4, 1914, as German Consul at Sunderland. He was indicted under 25 Edw 3, st 2, for high treason in assisting the enemy and adhering to the German Emperor. The overt acts charged were (1) procuring Martin, a German subject, for service in the German Army, and (2) publishing a letter to Martin with intent to procure him to go to Germany and serve. There were similar charges in respect of other German subjects. The proclamation of war appeared in the *Gazette* on August 5. Ahlers' defence was that all the acts charged against him were committed prior to the publication in the *Gazette*, and that he was under the impression that days of grace were allowed within which an alien enemy might leave the country. By an Order in Council under the Aliens Restriction Act, 1914, alien enemies were permitted to embark at Approved Ports without permits from the Secretary of State up to August 11.

The prisoner was found guilty of high treason by adhering to, aiding and comforting the King's enemies by the jury and sentenced by Shearman, J, to death

Judgment —Upon appeal to the Court of Criminal Appeal the conviction was quashed. In delivering the judgment of the Court Lord *Reading*, C J , said “During the first four days of August the appellant in his capacity of German Consul had taken steps to assist German subjects to return to their own country. That was in pursuance of his duty. He was strictly entitled, according to the law of England, to assist them to return although their purpose was to perform military duties in Germany. On August 5, in the morning, he read in a daily newspaper that war had been declared between England and Germany at 7 p m on the previous day. On August 5, according to the evidence, which is not in dispute, he undoubtedly did advise or assist two persons, who are mentioned in the indictment, *Martin* and *Korfer*, to return to Germany. It must be borne in mind that at the moment, according to the appellant’s statement, although he had read that a state of war existed, he did not believe it, he still thought that action might be taken by Germany which would prevent war. On August 5 he continued the policy which he had been pursuing for the preceding few days of assisting German subjects of military age to return to Germany. I should add that there was some evidence that on the morning of August 6 he did an act of the same character in his capacity as Germany Consul. He was arrested on August 6.

The acts were official acts and were quite openly done.

“Counsel for the appellant further submitted that the jury ought to be told that not the mere acts of the prisoner but his intention and purpose in doing them ought to be considered by them. It cannot be doubted that his intention and purpose were material to the issue before the jury. Unless the jury were satisfied that his intention was evil and that the appellant was intending to aid and comfort the King’s enemies and did these acts with this object, they could not find him guilty. We cannot, however, find that the jury ever had it brought to their minds that it was possible, if they thought it right, to adopt the view that the appellant

was not guided by any evil intention and had not the purpose of aiding and comforting the King's enemies. Neither can we say that the jury could not possibly have come to a conclusion favourable to the appellant if they had had the two alternatives before them. As this Court has often ruled, it is not enough to support the conviction that the jury might have come to the same conclusion had the proper direction been given. Before we can uphold a verdict of guilty found after a misdirection we must be satisfied that, had the proper direction been given, the jury *must* have come to the same conclusion and convicted the prisoner. We cannot so hold in this case.

"We cannot say that it follows from the evidence that the actions of the appellant were necessarily hostile to this country in intention and purpose, although there was evidence upon which the jury might have so found. Having come to the conclusion that a material point of the defence was not put to the jury, the Court thinks that the conviction cannot stand and must be quashed."

Rex v. Casement

86 L J K B 467, [1917] 1 K B 98

Case] Sir Roger David Casement, a British subject, born in Ireland in 1864, and in Government service until August 1, 1913, when he retired on a pension which he continued to claim up to October 7, 1914, was indicted for high treason under the statute of 25 Edw 3, st 2, by adhering to the King's enemies elsewhere than in the King's realm—to wit, in the Empire of Germany. The overt acts were the soliciting and inciting on certain specified days in 1914 and 1915 certain British subjects—members of the military forces of the King and prisoners of war at Limburg Lahn Camp in Germany—to forsake their duty and allegiance and to join the armed forces of his enemies and to fight against the King. Since these

overt acts were committed outside the King's dominions, they could only be tried by virtue of 35 Hen 8, c 6, which empowers the Court of King's Bench to try treasons committed out of the realm and dominions. Such trials were to be heard "before the King's Justices of his Bench for pleas to be holden before himself by good and lawful men of the same shire where the said Bench shall sit and be kept, or else be before such Commissioners and in such shire of the realm as shall be assigned by the King's majestie's Commission and by good and lawful men of the same shire, in like manner and form to all intents and purposes as if such treasons etc had been done, perpetrated and committed within the same shire, whereof they shall be so inquired of, heard and determined as aforesaid." So the trial was held in England in the King's Bench, and since it was of importance it was a trial at bar, *i e*, before the Judges of the King's Bench sitting *in banco*.

At the trial the Attorney-General, Sir F E Smith, contended that the words of the statute "giving to them aid and comfort in the realm" was an interpellation, put in to give some explanation or enlargement of the phrase "be adherent to the King's enemies" and consequently ought to be within brackets. The clause would then read as follows "If a man do levy war against our Lord the King in his realm, or be adherent to the King's enemies in his realm (giving to them aid and comfort in the realm) or elsewhere." This would make the words "or elsewhere" an addition to the words "be adherent to the King's enemies in his realm."

In support of this contention the Attorney-General cited (*inter alia*) *Rev v Cundell and others* (1812), 4 Newgate Calendar 62, where the prisoners, when prisoners of war in the Isle of France, deserted and entered the French service. Upon the surrender of the island to the British forces Cundell and some of the deserters gave themselves up. They were sent back to England, tried by a special commission and found guilty of adhering to the King's enemies. The indictment and the record show that the adherence was outside the realm.

All the overt acts were in the Isle of France. The Attorney-General also cited in support (*inter alia*) the opinions of Coke, Hale and Hawkins.

Counsel for the prisoner, Serjeant Sullivan, Artemus Jones and J. H. Morgan contended that whether treasonable acts committed abroad were treason or not, they were not until 28 Henry 8, either by the common law or by statute, triable here, since there was no venue. They also contended that the statute must be construed as it stands and not as it may have been interpreted by text writers, of whatever eminence. "Aid and comfort" refers solely to the man, the person named in the prior part of the statute, and the person who at the date of the statute had to be within the realm. It is the person who is adherent, giving them aid and comfort wherever they may be, who must be adherent to the King's enemies in his realm. "Giving aid and comfort" is not a description of the offence committed, but only a description of the overt acts by which it may be proved. The words must be construed as they stand. "giving them aid and comfort in his realm or elsewhere." The person adhering must be within the realm, but he may give aid and comfort within the realm or without. In other words the expression "or elsewhere" only governs the words "giving aid and comfort" and is not applicable to the words "be adherent to."

They also contended that the conditions prevailing at the time of the statute must be taken into consideration in ascertaining what was the intention of the Legislature. At that period a very large number of the barons owned estates in England and France or in England and Scotland. For his estates in England a baron owed suit and service to the English king, and for his estates in France suit and service to the French king. So, also, he owed suit and service to the Scottish king for his estates in Scotland. In the event of war between England and France, or between England and Scotland, if the words "or elsewhere" governed both parts of the clause of adhering, a baron owning estates in France or

Scotland would come within the mischief of the statute if he did suit and service to the French or Scottish king. In practice the English baron performed his service by lending his tenants to the English king and instructing his agent in France or Scotland to lend his tenants in France or Scotland to the French or Scottish king. Thus he was not "adhering to the King's enemies in his realm." This explains the meaning of the words "in his realm" in this part of the clause, and also explains why Coke in his interpretations found it necessary to omit these words.

Upon the motion to quash the indictment Lord *Reading*, C J, ruled (1) that if a man adhere to the King's enemies without the realm he is committing the offence of treason, (2) that the words "giving to them aid and comfort" may be read as in a parenthesis, but he did not exclude the application of the words "or elsewhere" to that parenthesis. He thought it applies just as much to the parenthesis as it does to the preceding words. He was of opinion, although it was not necessary to state it for the purposes of this case, that the words "or elsewhere" governs both limbs of the sentence—both the adhering to the King's enemies and the aid and comfort to the King's enemies—and that it is an offence to adhere within the realm or without the realm to the King's enemies, and it is equally an offence to adhere within the realm to the King's enemies by giving them aid and comfort without the realm. The motion therefore to quash the indictment must be refused.

Upon the facts counsel for the prisoner contended that the prisoner only asked persons to become members of the Irish Brigade for the purpose of assisting to oppose the Ulster Volunteers after the conclusion of the war. They were not asked to fight against England. The Crown contended that the true effect of the evidence was that after the first sea victory by Germany the Irish Brigade was to be landed in Ireland to fight against the British forces.

In his summing up to the jury Lord *Reading*, C J, said

“The offence of adhering to the King’s enemies is described in the words of the statute as ‘giving aid and comfort to the King’s enemies’ I direct you as a matter of law that if a man, a British subject, does an act which strengthens or tends to strengthen the enemies of the King in the conduct of the war against the King, that is, if a British subject commits an act which weakens or tends to weaken the power of the King and of the country to resist or to attack the enemies of the King and the country, that is in law the giving of aid and comfort to the King’s enemies” The question was, “Were the acts done such as would strengthen the German Emperor or such as would weaken His Majesty the King?”

“High treason is an offence against the duties of allegiance to the sovereign. It is founded on the relation of the person to the Crown, and on the privileges he derives from that relation.” His lordship then quoted the following passage from Foster’s *Law of High Treason*: “Natural allegiance is founded in the relation every man standeth in to the Crown, considered as the head of that Society whereof he is born a member, and on the peculiar privileges he deriveth from that relation, which are with great propriety called his birthright. This birthright nothing but his own demerit can deprive him of. It is indefeasible and perpetual, and consequently the duty of allegiance which ariseth out of it, and is inseparably connected with it, is, in consideration of law, likewise unalienable and perpetual.”

With regard to overt acts, said the learned Chief Justice, “there must be two witnesses to an overt act to justify you in finding the prisoner guilty—either two witnesses to one overt act, or one witness to one and another witness to another overt act, both of the same treason. Overt acts are such acts as manifest a criminal intention and tend towards the accomplishment of the criminal object. They are acts by which the purpose is manifested and the means by which it is intended to be fulfilled. According to our law it is

necessary in charging a prisoner with this offence to state in the indictment the overt acts upon which reliance is placed, and again the greatest care is taken that a man shall not be taken by surprise in a charge of this character, and the law says that no evidence shall be given of any overt act which is not charged in the indictment "

There were six overt acts charged, but it was not necessary that all should be proved "One overt act properly proved is all that is necessary to constitute the offence " And the jury must be satisfied before convicting the prisoner "of the intention and purpose of the act A man's intentions are to be gathered from his acts A man must be held to have intended the natural and reasonable consequences of his act That is one of the fundamental principles of our law, and after all it is only plain common sense Where a man, particularly an intelligent man, does an act which would appear reasonably to involve certain consequences you are entitled to assume that he intended those consequences You therefore have to ask yourselves, Did he do an act or acts of the nature I have described to you, of adhering to the King's enemies, giving aid and comfort to the King's enemies? And you must ask yourselves, Did he intend the reasonable consequences of the act? You have to determine whether the prisoner was contriving and intending to aid and assist the enemy If what he did was calculated to aid and assist the enemy, and he knew it was so calculated, then, although he had another or ulterior purpose in view, he was contriving and intending to assist the enemy . If he knew or believed that the Irish Brigade was to be sent to Ireland during the war with a view to securing the national freedom of Ireland, that is, to engage in a civil war which would necessarily weaken and embarrass this country, then he was contriving and intending to assist the enemy "

The prisoner was found guilty and sentenced to death He appealed to the Court of Criminal Appeal, under the Court of Criminal Appeal Act, 1907

Judgment —The judgment of the Court was delivered by Mr Justice *Darling*, after hearing Serjeant Sullivan for the prisoner and without calling upon counsel for the Crown. His lordship begins by quoting the Norman French of the statute “Ou soit aherdant as enemys nostre Seignr le Roi en le Roialme, donant a eux aid ou confort en son Roialme ou par aillours,” and continues “The main point in the argument of Serjeant Sullivan was that this statute had neither created nor declared that it was an offence to be adherent to the King’s enemies beyond the realm of the King, and that the words meant that the giving of aid and comfort, *ou par aillours*, that is outside the realm, did not constitute a treason which could be tried in this country unless the person who gave the aid and comfort outside the realm, in this case within the Empire of Germany, was himself within the realm at the time he gave the aid and comfort. This argument was founded upon the difficulties which must arise owing to the doctrine of venue, that people were only triable within certain districts where the venue could be alleged. But there is a large amount of authority for the proposition that what the jury have found is an offence triable, as this offence was triable, in the King’s Bench. Taking the words of the statute themselves, it appears to us that the construction for which Serjeant Sullivan contends is not the true one. We agree that if a person being within this country gives aid and comfort to the King’s enemies in this country he is adherent to the King’s enemies, we agree (and Serjeant Sullivan admits this) that if he is in this country, and he gives aid and comfort to the King’s enemies outside this country, he is adherent to the King’s enemies. But we think there is another offence, and that these words must mean something more than that. We think that the meaning of these words is this ‘giving aid and comfort to the King’s enemies’ are words of apposition, they are words to explain what is meant by being adherent to, and we think that if a man be adherent to the King’s enemies in his realm by giving to them aid and

comfort in his realm, or if he be adherent to the King's enemies elsewhere, that is by giving to them aid and comfort elsewhere, he is equally adherent to the King's enemies, and if he is adherent to the King's enemies then he commits the treason which the statute of Edward III defines. Reasons may be given for that, but we think a very good reason is to be found in this, that the subjects of the King owe him allegiance, and the allegiance follows the person of the subject. He is the King's liege wherever he may be, and he may violate his allegiance in a foreign country just as well as he may violate it in this country." After referring to *R v Cundell* and 35 Hen 8, the learned Judge quoted following passage from Maxwell's *Interpretation of Statutes*, chap 2 "When this has been given by enactment or judicial decision it is of course to be accepted as conclusive. But, further, the meaning given by contemporary or long professional usage is presumed to be the true one, even when the language has etymologically or popularly a different meaning. It is obvious that the language of a statute must be understood in the sense in which it was understood when it was passed¹, and those who lived at or near the time when it was passed may reasonably be supposed to be better acquainted than their descendants with the circumstances to which it had relation, as well as with the sense then attached to it by the Legislature, and the interpretation put upon its enactment by notorious practice may perhaps be regarded as some sanction and approval of it."

The learned Judge then referred to the opinions of Coke, Hale, Hawkins, Pulton, and Sir Thomas Fitzjames Stephens. He also referred to the opinion given in 1775 of Thurlow, A-G, and Wedderburn, S-G, which covered the present case.

In conclusion, he said "We do not consider it necessary to give further reasons for the conclusion to which we have

¹ This was precisely Serjeant Sullivan's contention.

come " We purposely do not rely upon a recent case [*R v Lynch*] which has been questioned by Serjeant Sullivan, simply for the reason that we are of opinion that there is ample authority for the conclusion to which the Court indubitably came to in that case, ample authority to be found in the decisions and in the opinions of the great lawyers to which I have referred in giving the judgment of this Court. It only remains to say that the appeal is dismissed "

OVERT ACTS

Lord Preston's Case.

12 *St Tr* 646 (1691)

Case.] Lord Preston was indicted under the name of Sir Richard Grahame, Bart ,¹ for high treason by conspiring with others to depose their Majesties, to compass their death, to levy war within the kingdom, and to procure an invasion by the French King The overt acts charged were various letters and ~~instructions~~ instructions giving information to the French King respecting their Majesties' naval forces and military defences, causing and procuring great forces to be raised against their Majesties and sending ships to plague the city of London and procuring war and rebellion within the kingdom and preparing several bills of exchange for payment of money to the King's enemies and hiring a ship to carry the conspirators and the said bills, letters and instructions to the King's enemies and preparing a boat to carry them to the said ship and entering the said boat and going on board the said ship And the prisoner, with John Ashton and Edmund Elliott, was further charged with adhering to the enemies of the King and Queen by procuring the said bills, etc , and hiring the said ship and boat to carry them to France, and going on board the said ship with the intention to aid and assist the King's enemies in counsel and intelligence

The three men were captured in the smack soon after passing the Block-house of Graves with the letters, etc , upon their persons They were found lying under the hatches

¹ He was Viscount Burton of Scotland His claim to an English peerage had been rejected by the House of Lords

Upon the objection by Lord Preston that no act of treason in the county of Middlesex as alleged had been proved, *Holt*, C J, ruled that if it were proved that Lord Preston had an intention to carry the papers to France, and took boat at Surrey Stairs in the county of Middlesex, wherever he acted in order to carry out that design, there was an overt act in the county of Middlesex. In his summing up the Chief Justice told the jury, ' if you are satisfied upon the evidence that my lord was privy to this design contained in these papers, and was going with them into France, there to excite an invasion of the kingdom, to depose the King and Queen, and make use of the papers to that end, then every step he took in order to do it is high treason wherever he went, his taking water at Surrey Stairs in the county of Middlesex will be as much high treason as the going aboard ship in Surrey or, being found on shipboard in Kent, where the papers were taken.

The prisoner was found guilty of high treason and sentenced to death. He was afterwards pardoned.

Harding's Case.

12 St Tr 645 (1690)

Case.] Patrick Harding was indicted for high treason by compassing to depose the King and Queen and to kill them, and that to this end he levied war and rebellion against them and listed divers soldiers to war against them and procured these soldiers to go out of England to join with other enemies and rebels of the King and Queen and war against them.

Upon this indictment the petit jury found that Harding to the intent to depose the King and Queen and deprive them of their royal dignity, and to restore the late King James, did for money by him paid, list, hire, raise and procure sixteen men, subjects of this kingdom, to fight and wage war against the King and Queen, and them did send out of this

kingdom into France, to assist and aid the French King who then was and yet is an enemy to the King and Queen, and in open war, and to join themselves with the enemies and rebels of and against the King and Queen in waging war against the King and Queen, and if upon this the prisoner is guilty of high treason, we find him guilty, but if not, then not guilty

Nine of the Judges of England met upon this special verdict, whereof seven were of opinion that this was treason, one that it was not, and one doubted, and it was resolved—

1 That to hire soldiers to join with the enemy of the King and Queen in war against them to the intent to depose the King and Queen is high treason

2 That declaring by an overt act a design to depose the King and Queen is an overt act to manifest a conspiracy ~~of~~ of their death

The Case of Hugh Pine, Esq.

Croke, Car 117, 1 *Hale, P C* 114 (1628)

William Collier attending Mr Pine at his house in the country was demanded of him whether he had seen the King at Hinton or no? Collier answered that he had seen the King there Mr Pine replied “Then hast thou seen as unwise a King as ever was, and so governed as never King was, for he is carried as a man would carry a child with an apple, therefore I and divers more did refuse to do our duties to him”

After which, at another time, Monsieur Sabiza being at Mr Pawlett’s house at Hinton, Mr Pine asked Collier whether the King was there or no? who answered that he heard he was Mr Pine replied that he could have had him at his house, if he would, as well as Mr Pawlett

At another time one George Morley, a locksmith, being at Mr Pine’s house, he asked him, “What news?” Whereunto he answered that he heard the King was at Mr Pawlett’s

at Hinton Then Mr Pine said "That is nothing, for I might have had him at my house as well as Mr Pawlett, for he is to be carried any whither" And then Mr Pine said aloud "Before God, he is no more fit to be King than Hickwright" This Hickwright was an old simple fellow who was then Mr Pine's shepherd

These words being then proved by William Collier and George Morley, all the Judges were commanded to assemble themselves to consider and resolve what offence the speaking of those words were

Whereupon Sir Nicholas Hyde, C J , Sir Thomas Richardson, C J , Sir John Walter, C B , Sir William Jones, J , Sir Henry Yelverton, J , Sir Thomas Trevor, B , and George Vernon, B , met at Serjeants Inn, Fleet Street, where they debated the case amongst themselves in the presence of Sir Robert Heath, A -G , and divers precedents were then produced, which are set out in the Report

"Upon consideration of all which precedents and of the statutes of treason, it was resolved by all the Judges before named, and so certified to his Majesty, that the speaking of the words before mentioned, though they were as wicked as might be, were not treason For they resolved that unless it were by some particular statute, no words will be treason, for there is no treason at this day but by the statute of 25 Edw 3, c 2, for imagining the death of the King, etc , and the indictment must be framed upon one of the points in that statute, and the words spoken here can be but evidence to discover the corrupt heart of him that spake them, but of themselves they are not treason, neither can any indictment be framed upon them

"To charge the King with a personal vice, as to say of him 'that he is the greatest whoremonger or drunkard in the kingdom,' is no treason, as Yelverton said it was held by the Judges, upon debate of *Peacham's Case* "

Rex v. Charnock

2 Salkeld 681 (1695)

“ The question was at the trial, whether words could be an overt act of treason in compassing the death of the King? For Hale P C 13 says words are not an overt act of treason unless set down in writing *Et per* Holt, loose words spoken without relation to any act or project are not treason, but words of persuasion to kill the King are overt acts of high treason, so is a consulting how to kill the King, so if two men agree together to kill the King, for the bare imagination and compassing makes the treason, and any external act that is a sufficient manifestation of that compassing and imagining is an overt act It was never yet doubted, but to meet and ~~consult~~ ^{consult} how to kill the King was an overt act of high treason *Vide*, Croke, Car 117 ”

CONSTRUCTIVE TREASON

Rex v Florence Hensey

1 Burrows, 643 (1758)

Case.] Dr Florence Hensey was indicted for high treason in adhering to and aiding and corresponding with the King's enemies. Certain papers were found in his custody and were proved to be in his handwriting.

In his summing up Lord Mansfield, C J, said Levying war is an overt act of compassing the death of the King an overt act of the intention of levying war or of bringing war upon the kingdom is settled to be an overt act of compassing the King's death. Soliciting a foreign prince, even in amity with this Crown, to invade the realm is such an overt act, and so was *Cardinal Pool's Case*. And one of these letters is such a solicitation of a foreign prince to invade the realm.

Letters of advice and correspondence and intelligence to the enemy, to enable them to annoy us or defend themselves written and sent, in order to be delivered to the enemy, are *though intercepted*, overt acts of both these species of treason that have been mentioned. And this was determined in *Gregg's Case*, where the indictment (which I have seen) is much like the present indictment. The only doubt there arose from the letters of intelligence being *intercepted and never delivered*, but they held "that *that* circumstance did *not* alter the case."

As to the fact in the present case the jury are to consider whether they were written by the prisoner at the bar, in order to be delivered to the enemy and with intent to convey to the enemy such intelligence as might serve and assist them in carrying on war against this Crown or in avoiding the destinations of our enterprises and armaments against them.

As to the *locality* of the facts, he said, it is certain that *some one* overt act must be proved in the county where the indictment is laid indeed, if *any one* be so proved in *that* county, it will let in the proof of others in *other* counties

Now here *one* of the letters is *dated* at Twickenham, which is in Middlesex

The prisoner was found guilty and sentenced to death

Regina v Dammaree and others.

15 St Tr 522 (1710)

Case] Daniel Dammaree, a waterman, Francis Willis, a footman, and George Purchase, a sheriff's officer, were indicted for high treason in levying war against the Queen, ~~under~~ the pretence of pulling down the meeting-houses of the Dissenters Dammaree was the leader of the mob which, during the trial of Dr Sacheverell, became very riotous in the support of his cause, and proceeded in great numbers to pull down the meeting-houses of the Dissenters, four of which were pulled down Counsel for the prisoner in *Dammaree's Case* (the prisoners were tried severally) contended that Dammaree was not proved to be at the meeting-house in Drury Lane, but only at the fire in Lincoln's Inn Fields of the material brought from Dr Burgess's house in Drury Lane, and if he was only at one place, one instance would not make it levying war If there had been a general intention to pull down all meeting-houses it would be otherwise There was an intention the night before, and Mr Burgess's only was mentioned, and it was not certain that there was a general intention to pull down the rest The prisoner was only at the fire in Lincoln's Inn Fields by accident

In his summing up, Sir *Thomas Parker*, C J, said "He that levies war does more than compass and imagine the King's death, therefore it has always been ruled that where there is an actual levying of war which concerns the person

of the King, they lay the treason to be the compassing the death of the King, and give a proof of it by levying war. But there is another levying of war, which is not immediately against the person of the King, but only between some particular persons. There is a vast difference between a man's going to remove an annoyance to himself and going to remove a public nuisance, as the case of bawdy-houses, and the general intention to pull them all down is the treason for if those that were concerned for them would defend them, and the others would pull them down, there would be war immediately.

“In the case of inclosures, where the people of a town have had part of their common inclosed, though they have come with a great force to throw down that inclosure, yet that is not levying of war, but if any will go to pull down all inclosures and make it a general thing to reform that ~~which~~ they think a nuisance, that necessarily makes a war between all the lords and the tenants. A bawdy-house is a nuisance, and may be punished as such, and if it be a particular prejudice to any one if he himself should go in an unlawful manner to redress that prejudice, it may be only a riot, but if he will set up to pull them all down in general, he has taken the Queen's right out of her hand, he has made it a general thing, and when they are once up, they may call every man's house a bawdy-house, and this is a general thing, it affects the whole nation.

“Now, to come to this instance. If you believe the evidence, Dammaree was concerned in pulling down two meeting-houses. he was not present at Drury Lane, that is, he was not proved to be, but if he set others on to do it, it is his doing, and he as much pulled down that meeting-house in Drury Lane as if he had pulled it down with his own hands. Besides, they tell you his declaration that he would have all of them down. Again, these gentlemen do not seem to deny but if the intention were general it would be levying war. If it were general, where would it end? And it is taking on

them the royal authority, nay, more, for the Queen cannot pull them down till the law is altered. Therefore he has taken on him, not only the royal authority, but a power that no person in England has. It means all that are against the meeting-houses on one side, and all that are for them on the other, and therefore is levying war."

The prisoner was found guilty and sentenced to death. He was reprieved and afterwards pardoned. Willis was acquitted. In the case of Purchase the jury found a special verdict by direction of the Court, there being, says Foster, some diversity of opinion among the Judges, because it did not appear upon the evidence that he had any concern in ~~the~~ original rising or was present at the pulling down of any of the houses, or in any way active in the outrages of that night, except his behaviour at the bonfire in Drury Lane, whither he ~~came~~ by accident, for ought appeared to the contrary.

Nevertheless, upon this special verdict he was found guilty by the majority of the Judges on the ground that the rest of the rabble was traitorously assembled, and in the very act of levying war when Purchase joined them and encouraged them to proceed, and assaulted the guards who were sent to suppress them. All this being done in defence and support of persons engaged in the very act of rebellion involved him in the guilt of that treason in which the others were engaged. (See Foster's Discourse of High Treason, p. 215.)

Rex v George Gordon.

21 St Tr 485, *Douglas Rep B R 569* (1782)

Case.] The prisoner, Lord George Gordon, was indicted for high treason in levying war against the King by putting himself at the head of a mob which assembled on June 2, 1781, for the purpose of presenting to Parliament a petition for the repeal of the statute of 18 Geo 3, c 60, which mitigated the penalties to which Roman Catholics were then liable. This

mob was alleged to be armed and arrayed in warlike manner, *z e*, "with colours flying and with clubs, bludgeons, stones and other warlike weapons, as well offensive as defensive "

By 13 Car 2, c 5, no petition to the King or to either house of Parliament for alteration of matters established by law in Church or State shall be signed by more than twenty names or delivered by more than ten persons

The petition in question was signed by thousands of persons, and Parliament was besieged by the mob for several hours

On subsequent days riots followed Many houses were ~~burned~~ down, gaols were broken open, and attempts made upon the Bank of England and to cut off the New River water by which fires might be put out There can be no doubt that the object of the mob was to overawe Parliament and to procure the repeal of the obnoxious statute by force

Gordon was accordingly also indicted for levying war in respect of these riots

In his celebrated speech for the defence Erskine did not attempt to controvert the current doctrine He admits that "war may be levied against the King in his realm not only by an insurrection to change or to destroy the fundamental constitution of the Government itself by rebellious war, but by the same war to endeavour to suppress the execution of the laws it has enacted, or to violate and overbear the protection they afford not to individuals (which is a private wrong) but to any general class or description of the community by premeditated open acts of violence, hostility, and force

The only overt act charged is the assembling the multitude which went up with the petition , If it had been proved that the same multitude *under the direction* of Lord George Gordon, had afterwards attacked the Bank—broke open the prisons—and set London in conflagration, I should not now be addressing you—Do me the justice to believe that I am neither so foolish as to imagine I could have defended him nor so profligate as to wish it if I could "

Such acts would have been treason, but his defence was that Gordon had nothing to do with the riots, which so far as Gordon was concerned were the unintended and unexpected consequences of heading the mob for the purpose of petitioning Parliament, which was a misdemeanour

In his summing up Lord *Mansfield*, C J , said " There are two kinds of levying war —one is against the person of the King, to imprison, to dethrone or to kill him, or to make him change measures or remove counsellors, the other, which is said to be levied against the majesty of the King, or in other words against him in his royal capacity, as when a multitude rise and assemble to attain by force and violence any ~~object~~ of a general public nature, that is levying war against the majesty of the King, and most reasonably so held, because it tends to dissolve all the bonds of society, to destroy property ~~and to overturn government~~, and by force of arms to restrain the King from reigning according to law As Holt, L C J , says in *Sir John Friend's Case* ' if persons do assemble themselves and act with force in opposition to some law which they think inconvenient and hope thereby to get it repealed, this is a levying war and treason ' In the present case it don't rest upon an implication that they hoped by opposition to a law to get it repealed, but the prosecution proceeds upon the direct ground that the object was, by force and violence, to compel the legislature to repeal a law, and therefore, without any doubt I tell you the joint opinion of us all, that if this multitude assembled with intent, by acts of force and violence, to compel the legislature to repeal a law, it is high treason, if either the multitude had no such intent or supposing they had, if the prisoner was no cause, did not excite and took no part in conducting, counselling or fomenting the insurrection he ought to be acquitted, and there is no pretence that he personally concurred in any act of violence "

The prisoner was acquitted and Stephen thought he was guilty of nothing more than hare-brained though criminal folly in heading an unlawful assembly (Hist Cr L , Vol II, 274)

TREASON FELONY

Regina v Meany

10 Cox C C 506 (1867)

Case.] The defendant was indicted for treason felony in compassing (1) to depose the Queen, (2) to levy war against the Queen in Ireland, and (3) to stir up foreigners by force to invade Ireland. The venue was the county of the city of Dublin. No overt act of the treasonable compassing was proved to have been done personally by the defendant within the venue, nor did he appear to have been within the realm at the time of the commission of any of the overt acts. But overt acts were laid and proved as done within the venue by members of the Fenian Brotherhood (who were not named in the indictment). The defendant was an active member of this association in the United States, but there was no evidence of any acts done by the defendant himself in Ireland. Upon this evidence the defendant was found guilty. The following questions were reserved for the consideration of the Court for Crown Cases Reserved —(1) Whether the said Commission Court had jurisdiction to try the defendant for the said alleged felonies or any of them.

(2) Whether the Judge was right in directing the jury that there was evidence on which they might find that some or one of the said alleged overt acts were or was done and the said felonies committed by the defendant in the county of the city of Dublin.

Held —(*Piggott*, C B, *O'Brien* and *O'Hagan*, JJ, and *Fitzgerald*, B, dissenting) that there was jurisdiction, since the responsibility of the defendant for the acts of his co-conspirators made their acts his acts so as to satisfy the common law rule that the offence must be proved where the venue is laid.

"In the present case," said *George, J.*, "sufficient evidence was given of the existence of a conspiracy—not two conspiracies, but one and the same conspiracy—ramifying in America and Ireland, that the defendant was a member of that general conspiracy in connection with the members in Ireland, and if so, the defendant became responsible for every act proved to have been done in furtherance of that conspiracy in Ireland by members of it whether named or not in the indictment, their acts, in fact, became the act of the defendant himself. If this be so the defendant is responsible here and in the eye of the law himself actually committed the overt acts proved against any of his co-conspirators, the offence of the defendant was therefore committed within the venue and the Judge had jurisdiction to try it under the ordinary commission."

Regina v Davitt and Wilson.

11 Cox C C 676 (1870)

Case] The prisoners were indicted for treason felony under 11 & 12 Vict c 12 with feloniously compassing and devising to deprive and depose the Queen from her style and with uttering, expressing and declaring by divers overt acts and deeds that is to say (1) in order to fulfil their felonious purpose they feloniously did conspire to levy war, insurrection and rebellion against the Queen within the realm, (2) did feloniously conspire to subvert the constitution, (3) to incite foreigners to invade Ireland, (4) to become members of the Fenian Brotherhood, having for its object the overthrow of the Crown, (5) to prepare means whereby the authority of the Queen in Ireland might be overthrown, (6) to procure and provide large quantities of arms and ammunition with intent to arm themselves and other evil-disposed persons to raise, make and levy insurrection and war against the Queen, (7) and did feloniously make and provide large quantities of arms with such intent, (8) did become members of the Fenian

Brotherhood, (9) did become members of an unlawful Association of which members were bound by oath by force to make Ireland a Republic, (10) did by causing to be conveyed arms and ammunition into Ireland, endeavour to aid and assist the said Association, (11) did feloniously and unlawfully conspire together to incite and urge divers subjects to join and become members of the Fenian Brotherhood, (12) feloniously entered into a treasonable conspiracy, etc., (13) did conspire in raising insurrections in Ireland and levying war in Ireland, (14) did feloniously conspire and consult with divers persons in raising insurrections in Ireland and ~~levying~~ war against the Queen, (15) conspired with such persons to levy war against the Queen, (16) to subvert the constitution and government of the realm, (17) to seize arms at Chester, (18) with others did at divers places in Ireland meet together aimed to fight the peace-officers of the Queen, (19) did aid and assist the Fenian Brotherhood in making war against the Queen, (20) did come into Paddington in the County of Middlesex and did make divers other journeys in order to aid in forwarding to Ireland arms and ammunition, for the purpose of fighting against the Queen's troops and peace-officers and for the overthrow of her power and authority in Ireland, (21) did conspire to cause to be sent large quantities of arms to Ireland with the object of their being used in Ireland in feloniously making war against the Queen, (22) did conspire to cause to be sent to Leeds quantities of arms and ammunition, with the object that they should be sent to Ireland and used in feloniously making war against the Queen and fighting against her troops and peace-officers, (23—25) similar laying different places, (26) did conspire to send to Paddington in the County of Middlesex quantities of arms and ammunition with the intent that they should be used in making war against the Queen, etc., (27) did cause to be brought to Paddington in the County of Middlesex and *within the jurisdiction of the Central Criminal Court*, and there did have large quantities of arms with the intent and

object that they should be used in levying war, insurrection and rebellion against the Queen, (28) did conspire that, with the intent of aiding such object, such arms should be brought into Paddington, etc, and the said Wilson did bring the said arms into Paddington within the jurisdiction, etc, (29—30) similar, (31) did conspire to meet together at Paddington within the jurisdiction, for the purpose of aiding and advancing the said object, (32) did for that purpose there meet together, (33) did for that purpose go to the Great Western Railway Station at Paddington within the jurisdiction, against the peace of the Queen, against her Crown and dignity and contrary to the statute

Second Count —That the prisoners did with divers others feloniously conspire to levy war against the Queen in Ireland, in order by force to compel her to change her measures and councils, and the said felonious purpose did utter and declare by divers overt acts (laying overt acts similar to those in the former count) against the peace of the Queen and her Crown and dignity and contrary to the statute

By section 3 of the Treason Felony Act, 1848, “if any person shall compass or devise to deprive or depose the Queen from the style or royal name of the Imperial Crown of the United Kingdom, or to levy war against Her Majesty, her heirs or successors, within any part of the United Kingdom in order to put any force or restraint upon or in order to intimidate or overawe both Houses or either House of Parliament or to move or stir any foreigner or stranger with force to invade the United Kingdom or any other of Her Majesty’s dominions or countries under the obeisance of Her Majesty, her heirs or successors, and such compassing, imaginations, inventions, devices or intentions or any of them shall express, utter or declare by publishing any printing or writing or by open and advised speaking or by any overt act or deed, every person so offending shall be guilty of felony”

Cockburn, C J, to the jury “The prisoners are indicted for what is in substance high treason, though that is not the

crime for which they are indicted, as under the statute, what would before have been high treason is now created an offence for which upon conviction, a lesser punishment than that of treason is to be inflicted. The substance of the charge against the prisoners contained in the voluminous indictment may thus be stated. A conspiracy to depose the Queen (a charge which would be proved by showing an attempt to depose her from her state as Sovereign in any part of her dominions—as Ireland) and with that object to levy war against her. And the overt acts relied upon in support of the conspiracy are the procuring and producing arms for the purpose of being used in the intended insurrection against the royal authority in Ireland. You will have to consider, first whether arms were provided in this country for the purpose of being sent to Ireland with the intention of being used and employed in rebellion there, next, whether they were sent by the prisoners or either of them, with the intention of their being so used and employed. We have the fact of the letter, proved to be in the handwriting of the prisoner Davitt, and proved by a witness for the defence to refer to the Fenian conspiracy and to traitors to it, and to the use of weapons against such traitors. We have the fact of large and repeated consignments of arms by the defendants to false addresses and fictitious persons in Ireland and other parts of the country, these arms coming from the workshop of the one prisoner—Wilson—and secretly consigned to false addresses in the handwriting of the other prisoner, Davitt. And the question naturally arises for what purpose were all these consignments, and why were they thus made? not openly, but secretly and by means of such devices and contrivances. The fact that strikes the mind most forcibly is that in all these cases there was concealment and contrivance, which must have been for some purpose. It is for you to exercise your own judgment as to whether it was an innocent purpose. There is internal evidence afforded by the nature of the acts themselves, laid as overt acts of the alleged conspiracy. When you

find men sending arms to a county in which disaffection and disloyalty exist—doing it secretly and by clandestine means and under circumstances calculated to excite extreme suspicion and distrust—in the absence of any explanation of such conduct, it will not be difficult to draw your own inferences as to the purpose and motive of such conduct if you believe that the prisoners sent these arms in order that they might be used in levying war against the Queen, then the case is established against them. These remarks on the evidence in the case have applied more particularly to the prisoner Davitt who directed the transmission of the arms. With regard to the other prisoner Wilson, there can be ~~no~~ doubt the arms were made by him and if he did no more than make and supply them, and merely shut his eyes to their destination, that is not sufficient to convict him. But if you believe that in supplying the arms he had a knowledge that they were about to be used for a traitorous purpose and with the intention that they should be so used, then he is involved with the other prisoner in a common guilt. And if he, knowing the object, though himself not caring about it, yet for the sake of sordid gain, lent himself to that object, he would be guilty. The great question is whether the arms were sent with the traitorous purpose of exciting insurrection.”

Both prisoners were found guilty. Davitt was sentenced to fifteen years penal servitude and Wilson to seven

Regina v. Gallagher and others

15 Cox C C 291 (1888)

Case.] Thomas Gallagher, Whitehead, Wilson, Ansburch, Curtin and Bernard Gallagher were indicted for treason felony in compassing to depose the Queen and in levying war against the Queen to compel her by force to change her counsels, and to overawe Parliament. The prisoners, who were members of branches of the Fenian Brotherhood in the

United States, whose object was to procure "the freedom of Ireland by force alone," came to England, provided with funds, with the intent to destroy public buildings (including the Houses of Parliament) by nitro-glycerine and other explosives

Lord *Coleridge*, L C J , ruled that the words "levying war" were general and descriptive "It was obvious," he said, "that war might be levied in very different ways and by very different means in different ages of the world And the Judges had never attempted to say that there could not be a levying of war in any other way than in the way brought ~~before~~ them in earlier times They had never professed or attempted to give any exhaustive definition, or say that there were certain modes in which the words of the statute should be interpreted, or that 'those were the only fashions of making war' " He was of opinion that it was enough to say in the present case, if the jury should be of opinion that the prisoners or any of them had agreed among themselves that some one of them should destroy the property of the Crown, and destroy or endanger the lives of Her Majesty's subjects by explosive materials such as it was suggested had been made use of, and if they were further of opinion that such acts had been made out, then the prisoners were guilty of treason felony within the meaning of the Act He agreed that they were thrown back to the words of the earlier statute, but they must receive a reasonable interpretation As he had suggested in the course of the argument, if three men with these explosive materials did the same acts with the same objects as it required 3,000 men to do in an earlier period when it was a levying of war, it seemed to him that the acts of the three men to-day were equally a levying of war

Lord *Coleridge* directed the jury —

(1) That if they thought that one or more of the prisoners did compass, devise or intend to force the Queen to change her counsels and to overawe Parliament by violent measures directed against either the property of the Queen, the public

property or the lives of the Queen's subjects, and not with a view of repaying any private spite or enmity against any particular subjects, it would be a levying of war against the Queen within the meaning of the first count of the indictment, that it was not the less compassing and intending levying war, because by the progress of science two or three men could do now what could not have been done years ago except by a large number of persons, that the question was, was there proof that the prisoners did what they did with intention of depriving and deposing the Queen or of separating Ireland from the Crown of England and establishing an independent republic?

(2) That if what the prisoners did was done to compel Her Majesty or her ministers by force to change the present constitution and to alter the relations between England and Ireland, or even to set up a separate Parliament in Ireland, it would be within the second count of the indictment

(3) That, if what the prisoners did was done for the purpose of intimidating and overawing both or either Houses of Parliament so as to frighten them into doing what otherwise they would not have done, it would be within the third count

Thomas Gallagher, Whitehead, Wilson and Curtin were found guilty and sentenced to penal servitude for life. Ansburgh and Bernard Gallagher were acquitted

RIOTS AND UNLAWFUL ASSEMBLIES

Rex v Birt and others

5 C & P 154 (1831)

Case] The prisoners were indicted for a riot and for an unlawful assembly With a large number of persons they assembled to cut down the fences of the inclosures of the Forest of Dean The surveyor-general of the forest and his woodmen did not think themselves strong enough to resist, and the inclosure fences were to the extent of a mile or more destroyed

Patteson, J , in his direction to the jury, said "The difference between a riot and an unlawful assembly is this If the parties assemble in a tumultuous manner, and actually execute their purpose with violence, it is a riot, but if they merely meet upon a purpose which if executed would make them rioters, and having done nothing they separate without carrying their purpose into effect, it is an unlawful assembly "

The prisoners were found guilty

Rex v. Fursey

6 C & P 81 (1833)

Case] The prisoner was indicted for stabbing a police serjeant with intent to resist arrest, and for taking part in an unlawful assembly and riot This was a public meeting held in Coldbath Fields called to adopt preparatory measures for holding a national convention, as the only means of obtaining and securing the rights of the people By order of the Secretary of State the meeting was proclaimed to be illegal and all subjects were warned not to attend

In his direction to the jury *Gazelle*, J , said " It appears from the evidence that the proclamation contained in the Riot Act was not read Now a riot is not the less a riot, nor an illegal meeting the less an illegal meeting, because the proclamation of the Riot Act has not been read, the effect of that proclamation being to make the parties guilty of a capital offence if they do not disperse within an hour, but if that proclamation be not read the common law offence remains, it is a misdemeanour, and all magistrates, constables and even private individuals, are justified in dispersing the offenders, and if they cannot otherwise succeed in doing so they may use force " He also ruled that if the placards concerning the meeting were posted up stating that the meeting was called to adopt preparatory measures as alleged, then it was an illegal meeting

The prisoner was acquitted

Regina v. Cunningham Graham and Burns

16 *Cox C C* 426 (1888)

Case] This prosecution arose out of disturbances in Trafalgar Square, which occurred on Sunday, November 13, 1887 In February preceding, a riot had taken place in the Square which caused great damage to property in the West End and had led to the prosecution of John Burns Meetings again commenced in October and the meeting of November 13 was called by the Metropolitan Radical Federation to demand the release of Mr William O'Brien, M P , and other Irish patriots On November 8 the Commissioner of Police issued a notice to the effect that no meetings would, until further intimation, be allowed in Trafalgar Square, and on November 12 a further notice that no organised procession would be allowed to approach Trafalgar Square on the 13th In spite of those notices the Federation decided to hold the meeting and arrangements were made by which the processions were

to converge on the Square' at the same time To prevent this concentration bodies of police were stationed at outlying points such as Waterloo Bridge, Westminster Bridge, St Martin's Lane, Waterloo Place, etc At each of these points serious conflicts occurred, in which about seventy policemen were injured, persons being armed with iron bars and sticks These processions were prevented from entering the Square

Graham and Buins, at the head of about 150 persons, attempted to break through the police cordon in the Square and were arrested They were indicted for a riot and an unlawful assembly, for assaults upon two police constables in the due execution of their duty and for common assaults upon the two constables

In his direction to the jury, *Charles, J* , said " A riot is a disturbance of the peace by three persons at least, who, with an intent to help one another against any person who opposes them in the execution of some enterprise or other, actually execute that enterprise in a violent and turbulent manner to the alarm of the people Whether such an enterprise be a lawful or an unlawful one does not matter, and I cannot tell you this too plainly with reference to riot it does not matter in the least whether the end which is proposed by the rioters is lawful or unlawful, they must not assert it by riot That is the law with reference to riot, and there can be no doubt that if there has been a riotous disturbance by three or more than three people in the execution of some purpose in which they are mutually interested, if there should be a riotous disturbance by them, and they actually carry out that purpose, then they are guilty of riot, no matter how lawful may be the end which they propose to themselves Now, with regard to an unlawful assembly, What is an unlawful assembly? That has been laid down by a very high authority in these terms 'An unlawful assembly is an assembly of persons with the intention of carrying out any common purpose' and mark 'lawful or unlawful, in such a manner

as to give firm and courageous persons in the neighbourhood of such assembly ground to apprehend a breach of the peace in consequence of it' Those are the definitions of riot and unlawful assembly, and there can be no doubt that either of those offences is committed whatever be the end which the persons who commit them have in view 'It has been generally holden,' says the learned person whose book I have before me,¹ 'that it is in no way material whether the act intended to be done by such assembly,' speaking of a riotous assembly, 'be of itself lawful or unlawful', from which it follows that if three or more persons seek to make a forcible entry into lands to which one of them has a good right in a violent manner, when that which is done might be done in a peaceable manner, they are as properly riotous as if the act intended to be done were never so unlawful For the law will not suffer persons to seek redress for their wrongs by a dangerous disturbance of the peace You will have to ask yourselves whether the defendants, or either of them, did in fact attempt to redress what they thought was a grievance of which they had a right to complain by means which endangered the public peace'' The learned Judge also ruled that the notice by the Commissioner did not constitute the meeting an unlawful meeting, and that if the defendants did not approach the Square with the intent to hold the meeting come what might, but went there simply to ask to be allowed to hold it and then walk away, they were not guilty of riot The jury had to consider "not whether the assembly had been unlawful the whole morning or whole afternoon, but whether when the defendants became participators it was an unlawful assembly'', they had to consider "the whole circumstances of the case, the circumstances under which it had been gathered together, the persons who were to take part in it and the demeanour and conduct of the assembly at the time" "It may well be," continued the

¹ Hawkins P O c 67, s 7

learned Judge, "that an assembly which is perfectly innocent at one time may become riotous and unlawful at another, and although you may have gathered together with a most innocent intention, still, if while you are so gathered together you determine to do an act of violence, then however innocent you may have been in your original gathering together, you become a member of a riotous assembly. Was this either a riotous assembly or an unlawful assembly at the time when Graham and Burns became participators in it or not? and according to the evidence of Sir Edward Reed they were among the leaders of it. If the proposal was then made to enter the Square by force, by such force as they could use, then you will be of opinion, I apprehend, that they are guilty of riot, inasmuch as they proceeded to the execution of that purpose and the public peace was thereby broken. But it may be that you may be of opinion that they did not proceed far enough with it to make them rioters. In that case if you should think that the intention of the assembly was to hold the meeting by force but that they had not proceeded far enough in that intention to make them riotous, then you will be at liberty, if you think fit, to find them guilty of being participators in an unlawful assembly. I ask you to say in your judgment whether the defendants were simply going there quietly to ask leave to hold a meeting, intending to come away again, or whether they went there deliberately to assert their alleged or real rights, for it matters not, which, by forcible means, and means which were dangerous to the public peace, and alarming to the neighbourhood. If the first alternative commends itself to your mind, you will acquit the prisoners of both charges, if the second, I think it will be your duty to find them guilty according to the view you take of their conduct. If you do not think that they executed their purpose sufficiently to constitute them riotous you can find them participators in an unlawful assembly."

The jury found the defendants not guilty of riot and assaulting the police, and guilty of taking part in an unlawful

assembly, and the defendants were each sentenced to imprisonment without hard labour for six weeks

Rex v Pinney

5 C & P 254, 37 R R 599 (1831)

Case] This was a trial at Bar of Charles Pinney, Mayor of Bristol and a justice of the peace, for neglect of duty in suppressing a serious riot which broke out on October 29, 1831, in Bristol

Pinney was charged with failing to suppress the rising by organising sufficient forces and by neglecting to give the necessary orders and withdrawing himself and failing to exercise his powers as a justice of the peace and allowing the said acts to take place

In his direction to the jury, *Littledale*, J, said "If a public officer be guilty of neglect of his duty he is liable to prosecution by information or indictment, but I do not know of any instance of a prosecution similar to the present, except that of Mr Kennett,¹ who was charged with not reading the Riot Act in the city of London at the time of the riots in 1780, and also with the release of some prisoners. However, the case of Mr Kennett differed from the present, as in his case there were two specific charges, whereas here is a charge of general neglect of duty from Saturday, October 29, till Monday, the 31st of that month, and this charge being more vague, it requires, therefore, more serious attention. It appears that on October 29 Sir Charles Wetherell was to hold the gaol-delivery at Bristol, he being the recorder of that city, and from the opinions Sir Charles expressed in Parliament on the subject of parliamentary reform, it was feared that there would be a riot, and a deputation was sent to London to have an interview with the Secretary of State on the subject. However, it was determined that the gaol-

¹ *Rex v Kennett* (1781), 5 C & P 282

delivery should be held; and on Saturday, October 29, Sir Charles Wetherell came to Bristol. It had been deemed expedient to have three hundred special constables appointed, which was thought a sufficient force. They were, indeed, not all special constables, as some persons refused to be sworn, and persons were hired (about a hundred) to make up the number. At the Guildhall, at Bristol, the Court was opened and the charter read, and after some hisses and groans Sir Charles Wetherell proceeded to the Mansion House. There the rioting continued, and stones were thrown. The Riot Act was read, and the mob increased so much that Sir Charles was obliged to leave the town. The mayor again read the Riot Act and addressed the people, and the military and the mob appear to have alternatively prevailed, and in the course of the evening a boy was unfortunately killed. However, by twelve or one o'clock on that night all appears to have been quiet. Many persons went home, but the mayor remained in the Mansion House and did not go to bed. About six or seven o'clock on the Sunday morning the mob assembled in greater force than ever, and Major Mackworth told the mayor that, as a military man, he considered that he (the mayor) was bound to leave the Mansion House, and he did so. The bridewell was next attacked by the mob, and the prisoners released, and after that the mob destroyed the governor's house at the gaol and set free the prisoners whom Sir Charles was to have tried. The mob then destroyed the bishop's palace and the prison at Lawford's Gate, and in the evening they burnt the Mansion House, the Excise Office, the Custom House, and two sides of Queen's Square, where they were stopped by the military and no further mischief was done, and the mob was finally put down. A great number of lives were lost many who were plundering the houses were burnt to death by the houses being in flames, and it therefore becomes material to consider whether all this was occasioned by the neglect of the civic or military authorities, or either of them, or whether it was occasioned by the authorities not

having sufficient force to put down the riot, and you are particularly to consider whether there was any default in the defendant "

After stating the charge the learned Judge continued " Now a person, whether a magistrate or peace officer, who has the duty of suppressing a riot, is placed in a very difficult situation, for if, by his acts, he causes death, he is liable to be indicted for murder or manslaughter, and if he does not act he is liable to an indictment on an information for neglect. He is therefore bound to hit the precise line of his duty, and however difficult it is to hit that precise line will be a matter for your consideration, but that, difficult as it may be, he is bound to do. The question here is whether the defendant did all that he knew was in his power, and which would be expected from a man of ordinary prudence, firmness and activity, to suppress these riots. Did he use those means which the law requires to assemble a sufficient force? Did he make all the use of those means which an honest man ought to do by his own personal exertions? "

The defendant, said the learned Judge, acted under the best legal and military advice, but that would be no answer if he acted contrary to law. Various acts of neglect had been charged, but the jury in order to convict must be unanimous in thinking him guilty of the same act of neglect. The number of special constables sworn in was considered sufficient at the time. The mayor was not bound to go out and head the constables, that was the office of the chief constable. " It is proved that he did go out and read the Riot Act, that he was actually struck, and that his life was in danger, and he was always near the spot " It was alleged that the mayor did not " organise " the constables. This was a new term in legal proceedings. If it meant marshalling and arranging the men in their wards, this was rather the duty of the head constable. He was charged with not ordering the military to fire, but he was dissuaded by Colonel Brereton and Major Mackworth. " If the defendant had given an order to fire

upon the rioters, and death had ensued, he would, upon an indictment for murder or manslaughter, have had great difficulty to defend himself, if it had appeared that he had given the order to fire against the advice of two distinguished military officers. I cannot say he could not have made a defence, but a strong *prima facie* case would have been made against him and the great question for you to consider is, whether the defendant has done all those things which the general rules of law require of magistrates which are that they should keep the peace and restrain rioters, and pursue them and take them, and to enable them to do this they may call on all the King's subjects to assist them, and the King's subjects are bound to do so. If the defendant did all he could to assemble a force, it was no fault of his that they would not act, and it appears on the evidence on both sides that there was no great disposition to attend to the requisitions of the defendant. Another charge is, that being required to ride with the 14th Light Dragoons the defendant would not do so. I do not think that a justice of the peace is bound to ride up and charge with the military. The military officer may act without any magistrate, but no prudent military man would do so, because his acting may be attended with loss of life. But if a magistrate gives him an order to act, that is all that is required. The charge in this case is very general and indefinite, and you will consider whether the defendant took the steps prescribed by law to collect a force, and whether he used that force as he ought, you will consider whether there was in him a criminal neglect of duty, and if you think there was, you will find the defendant guilty, but if you think not, you will acquit him."

Verdict —Not guilty. The jury handed in a written paper in the following terms "We unanimously find Charles Pinney, the late Mayor of Bristol, not guilty of the misdemeanours wherewith he is charged. We are of opinion, circumstanced as he was, menaced and opposed by an infuriated and reckless mob, unsupported by any sufficient

force, civil or military, deserted in those quarters where he might reasonably have expected assistance, that the late mayor of Bristol acted according to the best of his judgment, with zeal and personal courage ”

Regina v Neale and others

9 C & P 481 (1839)

Case] The defendants were indicted for a riot at Birmingham on July 4, 1839 There had been several meetings of a tumultuous character in the town, and, in consequence of the inefficient state of the local police, sixty metropolitan police were brought down who were sworn in as special constables One of the magistrates, Dr Booth, proceeded with them, on the evening of the 4th, to the Bull Ring, where the mob was assembled, to ask them to disperse The mob refused, overpowered the police, several of whom were dangerously wounded The Riot Act was read and the military called in, by whom the streets were cleared

In his direction to the jury *Littledale*, J , said “ It appears that on several days before July 4 a great number of persons were assembled at Birmingham, and it also appears that on July 4 there was an assembly of persons, but up to the time that Dr Booth went in among them I do not find that any riot had taken place on that day, it is, however, another question whether there had been an unlawful assembly, because if there was a meeting attended with circumstances calculated to excite alarm, that is an unlawful assembly, and whether there be an unlawful assembly may also depend on the resistance made to the attempt to disperse it, and prevent the persons remaining together, and it is not only in the power of magistrates and not only lawful for magistrates to disperse any such meeting, but if they do not, and are guilty of criminal negligence in not putting down any unlawful assembly, they are liable

to be prosecuted for a breach of their duty. The first question in the present case is whether this meeting, constituted as it was before Dr Booth and the police made their appearance, was an unlawful assembly, if it was, then the magistrates had a right to disperse it. The mode of dispersing an unlawful assembly may be very different according to the circumstances attending it. It might be an unlawful assembly in a very slight degree, parties might have got just within the pale of what is unlawful, and the appearance of one magistrate and two or three constables might disperse them. If this assembly were of that description, there was no pretence for a magistrate going with a great police force to disperse the persons assembled. But all those cases admit of a variety of shades, because an assembly may be such that, though up to the time the magistrate goes to it there may be no breach of the peace, yet it may be so far verging towards a riot that it may be the bounden duty of the magistrate to take immediate steps to disperse the assembly. If it was a slight matter a magistrate going with two or three constables would oblige the people to go away at once, but if he were to go to a large and tumultuous meeting with only two or three constables, it would be absurd, and he would only be laughed at, and there may be cases where a magistrate would be bound to use force to disperse the assembly. All those different cases must depend on their own circumstances, and you would have to say in each whether, under the particular circumstances, the magistrates were justified in resorting to the means that they did. If the meeting about which we are now inquiring was an unlawful assembly, it was the duty of the magistrates to disperse it, and you will have to consider whether the magistrates used more violent means than were necessary to disperse the assembly. They are to use all lawful means, and you must say whether or not they did more."

The jury found all the prisoners Guilty

SEDITION—SEDITIONOUS WORDS

Regina v Fussell

6 St Tr (N S) 723 (1848)

Case] The defendant was indicted for making a seditious speech at a Chartist meeting at Clerkenwell Green on Monday, May 29, 1848, and for taking part in an unlawful assembly and a riot. In his speech he denounced the conviction of John Mitchell, who had been convicted of treason-felony, saying "the Government have succeeded in convicting honest John Mitchell. How have they accomplished it? Why, by packed juries and partisan Judges. I tell Lord John Russell that I have no sympathy with his damnable Government. John Mitchell had asked if the Queen had not forgotten her duty to her country. I now ask the same question, and adopt his views. If the Queen forgets to recognise the people, then the people must forget to recognise the Queen. If John Mitchell is sent out of his country, every Irishman must rise and revenge the insult, or they will no longer be worthy the name. The Government is not worthy the support of any honest man, it is too contemptible to be recognised, and you must use your best endeavours to overthrow it. And now I wish to impress upon you that there is one safe way of getting rid of bad rulers who forget their duty to their country. I openly avow that I mean private assassination. What made the Emperor of Austria fly from his country? Why, the fear of assassination, and it is by these means that other bad rulers will soon fly. I have five sons, and I now declare that I would disown any one who would refuse to assassinate any person who may be

instrumental in banishing me from my country for such an offence as John Mitchell was convicted of ”

The Court was of opinion that there was no evidence to go to the jury with respect to riot

In his direction to the jury, *Wilde*, C J , pointed out that one of the most valuable of our institutions was the right of public meetings, and publicly discussing actual or supposed grievances. In such discussions there is naturally strong language, but this right must not be abused. In this case the defendant was charged with having uttered certain expressions. “There has,” said the learned Judge, “been a discussion as to whether those expressions amount to a seditious speaking or not. Gentlemen, it strikes me that whatever may be the name which may be given to that style of speaking, if those expressions are proved and believed by you to have been uttered with the intention of producing hatred and contempt of the constitution of the country, and of inducing to unlawful resistance, they are unlawful, and he who uttered them is liable to be punished. Whatever difficulty some persons may have in precisely defining in what sedition consists, I have no doubt that the expressions which are imputed to the defendant do at least fall within any definition whatever which can be given of sedition ”

As to the second charge of an illegal assembly “If it should appear to you,” said his lordship, “that this meeting was called and got up, and that persons were encouraged to meet for the purpose of speaking, and others for the purpose of hearing, seditious language—language exciting such persons to violence and to resistance of the law—there will be no doubt that that meeting is an illegal meeting, and that all who partook in the act of calling that meeting, and took part in those proceedings, which had such a tendency, will be guilty of attending an illegal public meeting ”

The defendant was found Guilty

Regina v. Ernest Jones

6 St Tr (ns) 783 (1818)

Case] The defendant Ernest C Jones, a barrister and prominent Chartist, was indicted for sedition, unlawful assembly and riot. Evidence was given that he attended a meeting at Bonner's Fields on Sunday, June 4 1818 that he told the people to stand shoulder to shoulder if they saw the police coming near to the meeting, to organise in their classes under class-leaders and in their wards, to steer clear of all partial outbreaks and partial rioting, there should be no peace in the country if he could prevent it until the poor man had his rights and the rich man had brought his nose to the grindstone, that not a single blow need be struck in England, that it must and would be struck in Ireland that the green flag should float over Downing Street and St Stephens that John Mitchell and Frost would be brought back and Sir George Grey and Lord John Russell would be sent to change places with them.

In his direction to the jury *Wilde, C J*, said ' The charge is that at a public meeting the defendant used violent language inflammatory language, with the intention to persuade and excite subjects of the country to form themselves into unlawful associations and combinations to incite them to insurrection, unlawful assemblies and breaches of the peace, and to obstruct and prevent by force of arms the execution of the law of this realm in the preservation of the peace. That is, not that they met to complain of some grievances, but that the defendant intended by his address to excite to a breach of the peace and to excite an opposition to the law as established. If you are of opinion, having regard to the right of the subject publicly to meet and discuss freely and boldly public grievances that what is there said and addressed to that mob was within the limit of that right, your verdict should be ' Not guilty ' It will be beyond

the limit if you think its tendency was to excite an assembly or other persons to insurrection, to incite them to adopt organisations for the purpose of getting up a body which should be able to resist lawful authority and to overthrow the Government, or to excite disaffection and discontent on the parties whom he addressed. In such case that will be beyond the limit, it will amount to what the law calls sedition. But if you think it within the limit, and an address which may be safely made without endangering the public peace, and without being the result of any such intention as the indictment imputes, your verdict should be 'Not guilty.' But, on the other hand, if you think it was an exciting speech, addressed either to present resistance or to induce the forming of the organisation for the purpose of further resistance, teaching the people how they should forbear until they had a power sufficiently strong to resist the Government and to resist the law in that case your verdict will be 'Guilty.' "

The jury found the defendant Guilty upon all the counts except that for riot.

Regina v Burns and others

16 *Cox C C* 355 (1886)

Case] John Burns, William Hyde Champion, Henry Mayers Hyndman, and John Edward Williams were indicted for unlawfully and maliciously uttering seditious words of and concerning Her Majesty's Government, with intent to incite to riot and to stir up ill-will between Her Majesty's subjects, and for conspiring to effect the said objects, and for unlawful assemblies.

A meeting had been organised by the Social Democratic Federation to be held in Trafalgar Square, on February 8, 1886. At this meeting, attended by 15,000 to 20,000 persons, at which Burns, carrying a red flag, was chairman, the alleged seditious speeches were made. After the speeches

the mob moved west, and the defendants made further speeches from the Achilles Statue in Hyde Park. Williams, in making the last speech, said "Kindly go home, for the very simple reason that there are a number of roughs who take delight in smashing windows, and don't do it because they want work. Don't attempt a revolution when you are not organised for it." The mob then went along Piccadilly to Oxford Street, breaking open and looting some wine and jewellers' shops.

In his direction to the jury *Cave, J.*, cited Mr Justice Stephen's definition of sedition from his *Digest of the Criminal Law*, Art 91 "Everyone commits a misdemeanour who publishes verbally or otherwise any words or any document with a seditious intention. If the matter so published consists of words spoken, the offence is called the speaking of seditious words. If the matter so published is contained in anything capable of being a libel, the offence is called the publication of a seditious libel." What is meant by "seditious"? "A seditious intention," says Stephen, "is an intention to bring into hatred and contempt or to excite disaffection against the person of Her Majesty, her heirs or successors, or the Government and constitution of the United Kingdom, as by law established, or either House of Parliament, or the administration of justice, or to excite Her Majesty's subjects to attempt, otherwise than by lawful means, the alteration of any matter in Church or State by law established, or to raise discontent or disaffection amongst Her Majesty's subjects, or to promote feelings of ill-will and hostility between different classes of such subjects."

He goes on to point out what sort of intention is not seditious. "An intention to show that Her Majesty has been misled or mistaken in her measures, or to point out errors or defects in the Government or constitution as by law established, with a view to their reformation, or to excite Her Majesty's subjects to attempt by lawful means the alteration of any matter in Church or State by law established, or to

point out, in order to their removal, matters which are producing, or have a tendency to produce, feelings of hatred and ill-will between classes of Her Majesty's subjects, is not a seditious intention "

"Now the seditious intentions," said his lordship, "which it is alleged existed in the minds of the prisoners in this case are First, an intention to excite Her Majesty's subjects to attempt, otherwise than by lawful means, the alteration of some matter in Church or State by law established, and, secondly, to promote feelings of hostility between different classes of Her Majesty's subjects I should rather prefer to say that the intention to promote feelings of ill-will and hostility between different classes of Her Majesty's subjects may be a seditious intention according to circumstances, and of those circumstances the jury are the judges

Any intention to excite ill will and hostility between different classes of Her Majesty's subjects may be a seditious intention, whether in a particular case this is a seditious intention or not, you must judge and decide in your own minds, taking into consideration the whole circumstances of the case

For your guidance I will read to you what was said by Fitzgerald, J, in the case of *R v Sullivan* (1868), 11 Cox C C 44, which was a prosecution for seditious libel

He said 'As such prosecutions are unusual, I think it necessary in the first instance to define sedition, and point out what is a seditious libel Sedition is a crime against society, nearly allied to that of treason, and it frequently precedes treason by a short interval Sedition in itself is a comprehensive term, and it embraces all those practices, whether by word, deed or writing, which are calculated to disturb the tranquillity of the State, and lead ignorant persons to endeavour to subvert the Government and the laws of the Empire The objects of sedition generally are to induce discontent and insurrection, and stir up opposition to the Government, and bring the administration of justice into contempt, and the very tendency of

sedition is to incite the people to insurrection and rebellion. Sedition has been described as disloyalty in action, and the law considers as sedition all those practices which have for their object to excite discontent or dissatisfaction, to create public disturbance, or to lead to civil war, to bring into hatred and contempt the Sovereign or the Government, the laws or constitution of the realm, and generally all endeavours to promote public disorder '.

"Then a little further on he says 'Words may be of a seditious character, but they might arise from sudden heat, he heard only by a few, create no lasting impression, and differ in malignity and permanent effect from writings. Sir Michael Foster said of the latter "Seditious writings are permanent things, and if published they scatter the poison far and wide. They are acts of deliberation, capable of satisfactory proof, and not ordinarily liable to misconstruction, at least they are submitted to the judgment of the Court naked and undisguised as they came out of the author's hands." That points to the nature of the proof between seditious writings and words, and also points to a difference in the effect which they have, and the extent to which that effect goes, though, of course, in regard to seditious words there may be a very great distinction between words uttered to two or three companions and words uttered to a large multitude '."

"If," said Mr Justice *Cave*, "you think that these defendants, if you trace from the whole matter laid before you, that they had a seditious intention to incite the people to violence, to create public disturbances and disorder, then undoubtedly you ought to find them guilty. If from any sinister motive, as, for instance, notoriety, or for the purpose of personal gain, they desired to bring the people into conflict with the authorities, or to incite them tumultuously and disorderly to damage the property of any unoffending citizen, you ought undoubtedly to find them guilty. On the other hand, if you come to the conclusion that they were

actuated by an honest desire to alleviate the misery of the unemployed, if they had a real *bona fide* desire to bring that misery before the public, by constitutional and legal means, you should not be too swift to mark any hasty or ill-considered expression which they might utter in the excitement of the moment

In order to make out the offence of speaking seditious words there must be a criminal intent upon the part of the accused they must be words spoken with a seditious intent, and although it is a good working rule to say that a man must be taken to intend the natural consequences of his acts, and it is very proper to ask the jury to infer, if there is nothing to show the contrary, that he did intend the natural consequences of his acts, yet, if it is shown from other circumstances that he did not actually intend them, I do not see how you can ask a jury to act upon what has then become a legal fiction

It is not at all necessary to the offence of uttering seditious words that an actual riot should follow, that there should be an actual disturbance of the public peace. It is the uttering with the intent which is the offence, not the consequences which follow, and which have really nothing to do with the offence "

The jury returned a verdict of *Not Guilty* as to each of the four defendants

SEDITIONOUS LIBELS

Rex v Shipley.

21 St Tr 849 (1788)

Case] In this case, known as the *Dean of St Asaph's Case*, Dean Shipley was defended by Erskine. The dean was indicted for a seditious libel in publishing a pamphlet entitled, "A Dialogue between a Gentleman and a Farmer." The author was Sir William Jones, his brother-in-law, and the pamphlet dealt with the principles of government, containing at the end a passage upholding the rights of subjects to bear arms, which might have been construed as advice to them to rebel.

The verdict of the jury, after much dispute, was recorded as "Guilty of publishing, but whether a libel or not the jury do not find." Upon this Erskine moved to set aside the verdict for misdirection, and obtained a rule to show cause why there should not be a new trial. On the motion for a new trial Erskine contended that it is a question of fact, and not of law, whether a libel is seditious or not. He declared that in all cases where the law either directs or permits a person accused of a crime to throw himself upon a jury for deliverance by pleading *generally* that he is not guilty, the jury thus legally applied to may deliver him from the accusation by a general verdict of acquittal, founded (as in common sense it evidently must be) upon an investigation as general and comprehensive as the charge itself, from which it is a general deliverance. The jury have not merely the *power* to acquit upon a view of the whole charge, without control or punishment, and without the possibility of their acquittal being annulled by any other authority, but they have a *constitutional legal right to do it*, a right fit to be

exercised, and intended to be a protection to the lives and liberties of Englishmen against encroachments and perversions of authority in the hands of fixed magistrates

In the course of his judgment Lord *Mansfield* reviewed the practice and decisions of the Courts since the Revolution. The directions of Mr Justice *Buller* in the present case had been similar to that of every Judge since. In *Tutchin's Case* 14 St Tr 1095, the direction (although Holt, C J, goes into the enormity of the libel) to the jury was "If you find the publication in London you must find the defendant guilty." In *R v Clarke* (1729), 17 St Tr 667, Raymond, C J, lays it down that *the fact of printing and publishing only is in issue*. In *R v Franklin* (1731), 17 St Tr 625, Raymond, C J, directs "that there were three points for consideration. The fact of publication, the meaning (those two for the jury), the question of law or criminality (for the Court upon the record)." In *R v Owen* (1752), 18 St Tr 1203, *Lee*, C J, directed a conviction if the jury thought the publication proved. The jury persisted in acquitting the defendant, generally, though they were asked specially whether they thought he had published the pamphlet. Lord *Mansfield* then referred to the cases in which he appeared as Attorney-General, and to those of *Almon*, *Miller* and *Woodfall*, publishers of *Junius's "Letters to the King"*¹ "I have always," said he, "stated the direction I gave, and the Court has always assented to it. The defence of a *lawful excuse* never existed in any case before me, therefore I have told the jury if they were satisfied with the evidence of the publication, and that the meaning of the *innuendoes* were as stated, they ought to find the defendant guilty, that the question of law was upon the record for the judgment of the Court." [The jury, however, in *Woodfall's* case returned a verdict of guilty of publishing only.]

¹ *R v Almon*, 20 St Tr 808, *R v Miller*, *ibid* 870, *R v Woodfall*, *ibid* 898

In unanimously discharging the rule for a new trial, Mr Justice *Willcs* admitted the correctness of *Erskine's* argument, that upon a plea of not guilty, or upon the general issue, on an indictment or information for a libel, the jury had not only the *pouer*, but a constitutional right to examine if they thought fit the criminality or innocence of the paper charged as a libel, declaring it to be his settled opinion that, notwithstanding the production of sufficient proof of the publication, the jury might upon such examination acquit the defendant generally, though in opposition to the directions of the Judge, without rendering themselves liable

Erskine then moved in arrest of judgment upon two grounds (1) Even if the indictment sufficiently charged a libel, the verdict given by the jury was not sufficient to warrant the judgment, (2) the indictment did not contain any legal charge of a libel Without calling upon *Erskine* to reply to the arguments of counsel for the prosecution, Lord *Mansfield* said they were unanimously of opinion that the indictment was defective, and that judgment should be arrested

Rex v Stockdale.

22 St Tr 289 (1789)

Case.] This was a prosecution of *Stockdale* for the publication of "A Review of the Principal Charges against *Warren Hastings*," by *Logan* (a minister of the Scottish Church, who died before the trial) It was alleged that the pamphlet was intended to asperse the House of Commons and to represent their proceedings against *Hastings* as corrupt and unjust, and their charges as originating from misrepresentation and falsehood Other passages selected from the pamphlet were "An impeachment of error in judgment, with regard to the question of a fine, and for an intention that never was executed and never known to the offending party, characterises a tribunal of inquisition rather than a court of parliament

the impeachment of Mr Hastings is carried on from motives of personal animosity, not from regard to public justice "

For the defendant Erskine contended that where an information charges a writing to be published of and concerning the Commons of Great Britain with an intent to bring that body into scandal and disgrace with the public, the author cannot be brought within the scope of that charge, unless the jury on examination and comparison of *the whole matter* published is satisfied that the particular passages charged as criminal, when explained by the context and considered as part of *one entire work*, were intended by the author to vilify the House of Commons *as a body* and were written *of and concerning them in Parliament assembled*

Erskine then proceeded to show that the purpose of Logan was not to attack the House of Commons but to defend Hastings against the articles of impeachment which had already been widely published by the managers

In his direction to the jury, Lord *Kenyon*, C J , said there were two points " Whether the defendant who is charged with publishing this, did publish it, and whether the sense in which the Attorney-General, by his innuendoes in the informations has affixed to the different passages, is fairly affixed to them

" In applying the innuendoes I accede to what was said by counsel for the defendant and which was admitted yesterday by the Attorney-General, as counsel for the Crown, that you must, upon this information, make up your minds that this was meant as an aspersion upon the House of Commons—and I admit also, that in forming your opinion, you are not bound to confine your inquiry to those detached passages which the Attorney-General has selected as offensive matter and the subject of prosecution But let me on the other side warn you, that though there may be much good writing, good argument, morality and humanity in many parts of it, yet if there be offensive passages, the good part will not sanctify the

bad part Having stated that I ought also to tell you that in order to see what is the sense to be fairly imputed to those parts that are culled out as the offensive passages, you have a right to look at the whole book and if you find it has been garbled and that the passages selected by the Attorney-General do not bear the sense imputed to them the man has a right to be acquitted ”

The jury returned a verdict of *Not Guilty*

Rex v Lambert and Perry

81 St Tr 340, 11 R R 748 (1810)

Case] The defendants were charged with printing and publishing a seditious libel with the intent to bring the King and his government into public hatred and contempt to the following effect —

“ What a crowd of blessings rush upon one’s mind, that might be bestowed upon the country in the event of a total change of system? Of all monarchs indeed since the Revolution, the successor of George the Third will have the finest opportunity of becoming nobly popular ”

In his direction to the jury Lord *Ellenborough*, C J , said he was not prepared to find this paragraph libellous If it meant to impute that the reign of His Majesty was the only thing interposed between the possession of great blessings which were likely to be enjoyed in the reign of his successor, and that it was intended to render His Majesty’s administration of his government obnoxious it was a calumnious paragraph If on the contrary it only imputed an erroneous view of public administration, it was not a libel At all times errors in the administration of the most enlightened men had occurred

The jury immediately found the defendants *Not Guilty*

Rex v Burdett

1 *St Tr* (N S) 1, 22 *R R* 539, 4 *B & Ald* 95 (1820)

Case.] The defendant, Sir Francis Burdett, was charged with seditious libel. He wrote in Leicestershire a letter (being his election address to the electors of Westminster) containing strong expressions upon the conduct of the Government in dispersing the mutiny in St Peter's Field, Manchester, on August 16, 1819. The letter was published in Middlesex. He stated that unarmed men and women "had been inhumanly cut down, maimed and killed by the King's troops."

Upon the direction of *Best, J*, that there was presumptive evidence of publication in Leicestershire and that the letter was, in his opinion, a poisonous libel, the defendant was found guilty of publishing a seditious libel in Leicestershire. He was fined £2,000 and sentenced to three months imprisonment.

Upon the motion for a new trial the Court (including *Best, J*) were unanimously of opinion that *Best, J*, had not exceeded his duty, as defined by the Libel Act. *Held*, also (*Bayley, J*, dissenting), that there was evidence on which the jury might properly be left to presume that the libel was published in Leicestershire.

Held, also, that where a defendant writes a libel in Leicestershire with the intent to publish and afterwards publishes it in Middlesex he may be indicted for a misdemeanour in either county.

Held, also, that where a libel imputes to others the commission of a triable crime, evidence of the truth of it is inadmissible.

Upon the question of misdirection, *Best, J*, said "I told the jury that they were to consider whether the paper was published with the intent charged in the information, and that if they thought it was published with that intent, it was

of opinion that it was a libel. I, however, added, that they were to decide whether they would adopt my opinion. In forming their opinion of libel, I told the jury that they were to consider whether the paper contained a sober address to the reason of mankind, or whether it was an appeal to their passions, calculated to incite them to acts of violence and outrage. If it was of the former description it was not a libel, if of the latter description, it was. It must not be supposed that the statute of George the Third made the question of libel a question of fact. If it had, instead of removing an anomaly, it would have created one. Libel is a question of law, and the Judge is a judge of the law in libel as in all other cases, the jury having the power of acting agreeably to his statement of the law or not. All that the statute does is to prevent the question from being left to the jury in the narrow way in which it was left before the statute. The jury were then only to find the fact of publication and the truth of the innuendoes, for the Judges used to tell them that the intent was an inference of law, to be drawn upon the paper with which the jury had nothing to do. The Legislature has said that that is not so, but that the whole case is to be left to the jury. But the Judges are in express terms directed to lay down the law *as in other cases*."

This view of the effect of the Libel Act was accepted by the other Judges, *Bayley, J*, *Abbott, C J*, and *Holroyd, J*, and the rule for a new trial was discharged.

Rex v Cobbett

2 St Tr (N S) 789 (1831)

[Case] William Cobbett was indicted for publishing a seditious libel with intent to create discontent and to invite to violence. In his *Weekly Register*, published on December 11, 1830, he wrote an article, referring to the recent rick-fire and destruction of threshing machines in Hampshire

and Wiltshire, in which he said (*inter alia*) "Without entering at present into the motives of the working people, it is unquestionable that their acts have produced good, and great good too. They have been always told and they are told now, and by the very parson that I have quoted above, that their acts of violence, and particularly their burnings, can do them no good, but add to their wants by destroying the food that they would have to eat. Alas! they know better, that one threshing machine takes wages from ten men, and they also know that they should have none of this food and that potatoes and salt do not burn. Therefore this argument is not worth a straw. Besides they see and feel that the good comes, and comes instantly too. They see that they do get some bread in consequence of the destruction of part of the corn, and while they see this, you attempt in vain to persuade them that that which they have done is wrong. And, as to one effect, that of making the parsons reduce their tithes, it is hailed as good by ninety-nine hundredths, even of men of considerable property, while there is not a single man in the country who does not clearly trace the reduction to the acts of the labourers, and especially to the fires, for it is to the terror of these, and not the bodily force, that has prevailed.

Cobbett conducted his own defence and made, as might be expected, a vigorous defence and a sharp attack upon the Whigs. He called a number of responsible persons, including Lord Brougham, L C, the Earl of Radnor, Sir Thomas Beevor, landowners and farmers, who were acquainted with his writings or had heard his lectures, who all testified that he was the very reverse of a person likely to incite the labourers to destroy property.

In his direction to the jury Lord Tenterden, C J, referred to the proposition of the Attorney-General, "that every man of common sense must be presumed to intend the effect which is the natural obvious consequence of the act he has done, that we can only judge of the motives of men by their actions, and if the act be obviously calculated to produce any

particular effect it is reasonable to infer, and it may be inferred from the circumstances, that the party meant to effect that object which the act he does is obviously calculated to produce " After referring to the evidence of the defendant's witnesses that they did not believe him to be a person desirous of exciting others to acts of violence, Lord *Tenterden* said " That opinion has been received in evidence and is to be taken into your consideration But, gentlemen, you are to give your verdict, not upon the opinion other persons have formed of Mr Cobbett's writings or his particular conduct, this is to be the result of your own conviction of the natural tendency of this publication as manifesting or not manifesting the design with which it is here charged to have been published, that it is your province to judge Passages more strong than those could not have been selected and made the subject of indictment It is not very easy to say—at least I do not find it easy to say—that any man of strong sense and good understanding should have conceived that language such as that was not likely rather to occasion than to prevent mischief "

After retiring for fifteen hours the jury sent word that they were equally divided and accordingly they were discharged The Attorney General entered a *nolle prosequi*

Rex v Carlile

4 C. & P 415 (1831)

Case] The defendant was indicted for a seditious libel with intent to encourage agricultural labourers to insurrection against the laws of the realm, to riots, routs and unlawful assemblies, to acts of violence, tumult and disorder, to arson and destruction of property The libel contained the following passages " A constitutional monarchy is a most ridiculous state of government, more than mimicking absolute monarchy and perpetuating all ancient follies and abuses

Everything conspires against a king to tell him he is something more than man, and all that sort of flattery is calculated to unman him, and make him less than man We want no mummeries and nonsense wherewith to please savages and fools in the present day ”

“ To the insurgent agricultural labourers—

“ You are much to be admired for everything you are known to have done during the last month, for as yet there is no evidence before the Public that you are incendiaries or even political rebels Much as every thoughtful man must lament the waste of property, much as the country must suffer by the burning of farm-produce now going on, were you proved to be the incendiaries, we should defend you by saying, that you have more just and moral cause for it, than any King or faction that ever made war had for making war In war, all destructions of property are counted lawful, upon the ground of that which is called the law of nations, yours is a state of warfare, and your ground of quarrel is the want of the necessaries of life in the midst of abundance You see hoards of food and you are starving You see a government rioting in every sort of luxury and wasteful expenditure, and you, ever ready to labour, cannot find one of the comforts of life Neither your silence nor your patience has obtained for you the least respectful attention from that government The more tame you have grown, the more you have been oppressed and despised, the more you have been trampled on, and it is only now that you begin to display your physical as well as your moral strength, that your cruel tyrants treat with you and offer terms of pacification Your demands have been, so far, moderate and just, and any attempt to stifle them, by the threatened severity of the new administration will be so wicked as to justify your resistance even to death and to life for life ”

In his direction to the jury the Recorder said “ Although you are at liberty, by the Act of 32 Geo 3, to give a general verdict, yet by the same Act, I am bound to give you my

opinion upon the law of the case, as if it were a case of murder or of any other species of offence. I have already said that with reference to the first count there may perhaps be some difference of opinion, but with respect to the second, which contains only the part addressed to the agricultural labourers, I am bound in law and in conscience to tell you, and I do tell you, as solemnly as I would pronounce the last supplication on my deathbed, that the matter set out in that count is a most atrocious, a most seditious, a most scandalous and a most dangerous libel, calculated to encourage his Majesty's subjects who were then, as the libel states, in actual insurrection, to continue in that state. This must be the tendency of it."

The jury found the defendant *Gilty* upon the second and third counts and he was sentenced to a fine of £200, to imprisonment for two years, and at the expiration of that period to give security for good behaviour for ten years, and to be further imprisoned until such security had been given and such fine paid.

Regina v. Collins

9 C & P 456 (1839)

Case] This was a prosecution for a seditious libel published by the defendant in a letter containing defamatory matter in relation to the riot in the Bull Ring, Birmingham, and describing the action of the police as (1) a wanton, flagrant and unjust outrage made upon the people of Birmingham by a bloodthirsty and unconstitutional force from London, acting under the authority of men who, when out of office, sanctioned and took part in the meetings of the people and now and then they share in the public plunder, seek to keep the people in social slavery and political degradation, (2) that the people of Birmingham are the best judges of their own right to meet in the Bull Ring or elsewhere, have their own feelings to consult

respecting the outrage given and are the best judge of their own power and resources to obtain justice, (3) that the summary and despotic arrest of Dr Taylor, our respected colleague, affords another convincing proof of the absence of all justice in England and clearly shows that there is no security for life, liberty or property, till the people have some control over the laws they are called upon to obey

Littledale, J , in his direction to the jury said "if the object of the letter were merely to shew that the conduct of the police was improper, that would not be illegal, because every man has a right to give every public matter a candid, full and free discussion. If the language of this paper was intended to find great fault with the police force, even that might not go beyond the bounds of fair discussion, and you have to say whether or not it does so

"With respect to the first resolution, if it contains no more than a calm and quiet discussion, allowing something for a little feeling in men's minds (for you cannot suppose that persons in an excited state will discuss subjects in as calm a manner as if they were discussing matters about which they felt no interest) that would be no libel, but you will consider whether the kind of terms made use of in this paper have not exceeded the reasonable bounds of comment on the conduct of the London police. With respect to the second resolution, it is no sedition to say that the people of Birmingham had a right to meet in the Bull Ring or anywhere else, but you are to consider whether the words, that 'they are the best judges of their own power and resources to obtain justice' meant the regular mode of proceeding by presenting petitions to the Crown or either House of Parliament or by publishing a declaration of grievances, or whether they meant that the people should make use of physical force as their only resource to obtain justice and meant to excite the people to take power into their own hands and meant to excite them to tumult and disorder

"The third resolution refers to the arrest of Dr Taylor,

and if the arrest of Dr Taylor was considered to be illegal, the defendant had a right to discuss it in a calm, quiet and temperate manner, and if Dr Taylor had been arrested in a manner wholly illegal and improper, we may allow for some warmth of expression. I have already said that the people have a right to discuss any grievance that they have to complain of, but they must not do it in a way to excite tumult. It is imputed that the defendant published this paper with that intent, and if he did so it is in my opinion a seditious libel."

Verdict *Guilty*

Regina v. Most

7 Q B D 244, 50 L J M. C 113 (1881)

Case] The defendant, a German subject, was indicted under 24 & 25 Vict c 100, s 4, for publishing and circulating an article written in German in a weekly newspaper called *Freiheit*, exulting in the recent murder of the Emperor of Russia and recommending it as an example to revolutionists throughout the world. Lord *Coleridge*, C J, directed the jury that if they thought that the defendant did intend to, and did encourage or endeavour to persuade any person to murder any other person, whether a subject of Her Majesty or not, and whether within the Queen's dominions or not, and that such encouragement and endeavouring to persuade was the natural and reasonable effect of the article, they should find the prisoner guilty. The jury found the prisoner *Guilty*. Sentence was deferred until the opinion of the Court of Criminal Appeal, whether such direction was correct, had been taken.

Held —That such direction was correct and that the publication and circulation of a newspaper article to the world, to multitudes of people wholly undefined, would come within the statute—that it was an encouragement or

endeavour to persuade to murder, an encouragement to the public—a solicitation and encouragement to any person who chooses to adopt it, although not addressed to any person in particular

Note—Section 4 provides that all persons who shall encourage or endeavour to persuade any person to murder any other person, whether a subject of the Queen or within the Queen's dominions or not, shall be guilty of a misdemeanour

This offence was punishable by a more severe punishment than the ordinary circulation of a libel at common law. As *Denman, J.*, said the statute was passed for this very purpose

In *Rex v Antonelli and Barberi* (1905), 70 J P 4, the defendants were charged with similar offences, *i.e.*, with inciting persons unknown to murder the sovereigns and rulers of Europe. The defendants were found guilty, but in his direction to the jury *Phillimore, J.*, said that in his opinion "a document published here which was calculated to disturb the Government of some foreign country was not a seditious libel, nor punishable as a libel at all"

In his *History of the Criminal Law*, Vol II, p 876, Stephen said that the law as to political libels had not been developed or altered since *R v Burdett*, and that in this generation the time for prosecuting them had passed. In a subsequent generation, however, this law was revived in the case of *Rex v Aldred* (1909), 22 Cox C C 1, in which the defendant was found guilty of publishing a seditious libel. It is quite true, said Lord *Coleridge, J.*, that a prosecution for seditious libel is somewhat of a rarity. It is a weapon not often taken down from the armoury in which it hangs, but it is a necessary accompaniment to every civilised Government. "Whoever by language, either written or spoken, incites or encourages others to use physical force or violence in some public matter connected with the State is guilty of publishing a seditious libel. The test is not either the truth of the language or the innocence of the motive with which the statement is published, but the test is this: was the language used calculated, or was it not, to promote public disorder or physical force or violence in a matter of State?"

SEDITIONOUS CONSPIRACIES

Rex v Henry Redhead [Yorke] and others.

25 St Tr 1008 (1795)

Case] Henry Redhead, otherwise Henry Yorke, gentleman, was indicted with Gales, a printer, and Davison, a labourer, for unlawfully, maliciously and seditiously conspiring and confederating with each other and with divers other disaffected and ill disposed persons, to traduce, vilify and defame the Commons' House of Parliament and the Government, and in pursuance of such conspiracy to cause to be assembled divers persons to the number of 4,000 and more at Castle Hill, Sheffield, for the purpose of hearing divers scandalous, seditious and inflammatory speeches, resolutions and writings of and concerning the Commons' House of Parliament and the Government, and published, uttered and read to the persons so assembled the said speeches, etc, and in further pursuance of the said conspiracy, in order to induce the subjects to believe that the Commons' House was inattentive to the lawful wishes and petitions of the people, did procure a motion to be made at the said assembly that a petition should be presented to the House of Commons for a reform in the representation of the people in Parliament, with the intent that the said motion should then and there be rejected and which motion was by the contrivance of the defendants then and there rejected

In his direction to the jury *Rooke, J*, said " You are to consider, supposing the innuendoes are fairly stated, whether it was their intention merely to enlighten the minds of the people upon a speculative point or to carry them a step farther and excite a spirit of discontent, disaffection and sedition in their minds "

The defendants were found *GUILTY*

Yorke was sentenced to a fine of £200, imprisonment in Dorchester Gaol for two years and until such fine was paid and security for good behaviour for seven years

He was some years later called to the Bar by the Inner Temple

Rex v Hunt and others

1 St Tr 171 (1820)

Case] Hunt was the chairman of the meeting in St Peter's Field, Manchester, held on August 16, 1819, to consider the propriety of adopting the most legal and effectual means of obtaining a reform in the Commons' House of Parliament. About 60,000 persons from Manchester and the neighbouring towns attended, many marched in military formation with banners bearing inscriptions such as "Annual Parliament," "Universal Suffrage," "Unite and be Free," "Equal Representation, or Death," "Vote by Ballot," "No Corn Laws," "No Boroughmongering," "Taxation without representation is unjust and tyrannical," "Rights of Man," "No Combination Acts," "Let us die like men and not be sold as slaves." One body of about 4,000 was brought up by Hunt. There were many women and children in most of the processions. There were no arms and the demeanour of all was, in the opinion of the Judge, peaceable and orderly. "God save the King" was sung and the persons present uncovered. In the opinion of the Judge there was no evidence of general panic in the town, or of interruption of business, nor any material evidence of circumstances calculated to excite terror or alarm other than the numbers assembled, the military order in which they came up and the banners displayed.

During the meeting, the magistrates, acting on sworn depositions of terror and alarm, issued warrants for the arrest of Hunt and others of the defendants, and to effect this called upon the troops in attendance.

In the charge made by the cavalry eleven persons are said to have been killed and 420 wounded

The defendants were charged with seditious conspiracy, unlawful assembly and unlawful drilling

In his direction to the jury, *Bayley*, J , said there were three purposes stated in the indictment of the seditious conspiracy (1) to cause persons seditiously to meet to disturb the public peace, (2) to raise discontent and disaffection in the minds of the subjects of the King, (3) to excite hatred and contempt of the government and constitution of the realm as by law established If any one of those was made out, that would be sufficient to warrant a verdict of guilty

As to the charge of an unlawful assembly *Bayley*, J , said As to everyone at this meeting who met purely for the purpose of considering the most effectual means of obtaining a reform in Parliament, as to everyone of those who met for that purpose singly and in particular, and for no other, their attendance, as it seems to me, was clearly a legal attendance, unless from the manner in which they met that manner was calculated to produce terror and alarm in the minds of the inhabitants Gentlemen, if that manner was calculated to produce terror and alarm, then all the persons who attended, though for a legal purpose, knowing of the existence of that manner, were certainly criminal in meeting, provided they met giving countenance to the meeting assembled in that particular manner "

As to the charge of drilling he told them that it " might be solely for the purpose of enabling the persons to walk to that assembly more comfortably, to add to their respectability , if that were the motive that was perfectly innocent It might have been the motive to overawe the Government of the Kingdom by intimating that they should be able by strength to obtain that which was not likely to be conceded to them by other means If it had that purpose probably it would have the crime of High Treason But it might have a middle purpose It might have this We mean by this

appearance of strength to secure attention to any speeches of sedition, to any speeches calculated to raise discontent and disaffection which may be made, and we mean by this appearance of strength to give confidence to any person who may be disposed to accede to those principles, and to unite with us in furtherance of those principles, and, if that were the case, then every man who attended with the knowledge that persons had been drilled for that purpose would also be an illegal attendant at this meeting ”

The jury found Hunt, Johnson, Knight, Healy and Bamford *Gilty* on the fourth count generally, which charged an unlawful and seditious assembling for the purpose of exciting discontent and disaffection and of exciting to hatred and contempt of the government and constitution

After a motion to set aside the verdict, or for a new trial, Hunt was sentenced to be imprisoned in Ilchester Gaol for two years and six months, and at the expiration of that time to find security for good behaviour for five years, himself in £1,000 and two sureties in £500 Johnson, Healy and Bamford to be imprisoned for one year in Lincoln Castle, and at the expiration of that period to find security for their good behaviour for five years, themselves in £200 each and two sureties in £100

Regina v. Vincent and others

3 St Tr (N S) 1037 (1839)

Case] The defendants were indicted for seditious conspiracy and unlawful assembly The other defendants were Edwards, Dickenson and Townsend, members of the Working Men's Association in Newport, which became affiliated to the National Convention (the headquarters of which were in London), and which had for its object to obtain the immediate adoption of “the People's Charter ” Vincent was sent to Newport by the National Convention to advance the cause in that town He was alleged to have made seditious speeches

at various meetings attended by the other defendants and hundreds of the inhabitants, many of whom were armed with sticks, advocating the doctrines of Chartism and a show of force for the purpose of intimidating the Government and resort to force if redress could not be otherwise obtained. He said that the Chartists would fight only for themselves. If Lord John Russell said to him, "You shall take up a musket," he would say, "I shall be to fight for myself and not for those who oppress the working people." He referred to the great charter of our liberties which he said was obtained by the barons marching against King John, "and shall the people be now less successful" in obtaining the People's Charter? He said that the Mayor of Newport and his partner Mr. Prothero were two of the greatest enemies of the working men. "I should like to see," he declared, "Mr. Prothero hung 'up to that lamp-post and when he is cut down I could point out a fit place for his interment." He told the crowd,

"You are not bound by the laws, because they are made by men in the election of whom you have no voice." Speaking of the contemplated establishment of a rural police he said, "If any policemen interfere with you break his head."

In his direction to the jury, *Alderson, B.*, said, a conspiracy "is a crime which consists either in a combination and agreement by persons to do some illegal act, or a combination and agreement to effect a legal purpose by illegal means." The prosecution alleged that the purpose of the defendants was to excite disaffection and discontent. The defendants said that their purpose was, by reasonable argument and proper petition, to obtain the five points of the Charter. If that were so it was not illegal to petition on those points. But if the defendants sought to effect those changes by physical force that was an offence. No civilised society could exist if changes were to be effected by force. If the jury were satisfied that the defendants conspired to excite disaffection they are guilty of conspiracy, and if they thought the nature of the meeting was such as would excite

alarm in the minds of rational and constant men they were guilty of attending unlawful assemblies

The jury found all the defendants *Guilty* of attending unlawful assemblies, and Vincent and Edwards *Guilty* of uttering violent and seditious language They acquitted all of conspiracy Vincent was sentenced to one year's imprisonment, Edwards to nine months, and Dickenson and Townsend each to six months

For the sentence on Vincent, see Lord Brougham's speech in the House of Lords, August 22, 1839, Hansard, Parl Deb 3rd ser 50, 483

Regina v O'Connell and others

5 St Tr (N S) 1, 1 Cox C C 865 (1844) ,

Case] The defendants, Daniel O'Connell, M P, John O'Connell, M P, Steele, Ray, Charles Gavan Duffy, Tierney, Tyrrell, Gray and Barrett were indicted for entering into a seditious conspiracy on divers days and in divers parts of Ireland to meet unlawfully, to raise divers large sums of money from subjects of the Queen and from inhabitants of foreign countries and subjects of foreign States, to deliver seditious speeches, to submit resolutions with intent to excite discontent and disaffection with the Government, laws and Constitution as by law established, and amongst the army, and by means of intimidation and demonstration of great physical force to procure changes in the Government, laws and Constitution, and especially by the means aforesaid to bring about and accomplish a dissolution of the legislative union between Great Britain and Ireland, and for conspiring to bring into hatred and disrepute the tribunals by law established in Ireland for the administration of justice and to intimidate the Houses of Parliament, and to bring about a dissolution of the Legislative Union between Great Britain and Ireland

On one or other of these counts the defendants were all found *Guilty*. Upon the motion to set aside the verdict on the indictment for seditious conspiracy the application was refused except in the case of Tierney. The motion on arrest of judgment was refused. Thereupon the defendants moved to stay execution of the sentence about to be pronounced pending a writ of error. This application, which was said by the Court to be without precedent, was also refused, and Daniel O'Connell was sentenced to twelve months' imprisonment, a fine of £2,000 and security for good behaviour for seven years in the sum of £5,000. The other defendants were sentenced to nine months' imprisonment, a fine of £50 and security for good behaviour for seven years and sureties in the sum of £1,000 each.

The defendants then sent out writs of error, but the judgments were affirmed by the Court. The procedure of writ of error from the King's Bench in Ireland to the King's Bench in England having been abolished by 23 Geo 3, c 28, error lay from the King's Bench in Ireland to Parliament. Accordingly the defendants brought writs of error in Parliament. The case came on in the House of Lords, before Lord *Lyndhurst*, LC, Lord *Brougham*, Lord *Denman*, Lord *Cottenham*, and Lord *Campbell*. The Judges summoned to attend were *Tindal*, CJ, *Patteson*, *Williams*, *Coleridge*, *Coltman*, and *Maule*, JJ, *Parke*, *Alderson* and *Gurney*, BB. After argument by counsel, eleven questions were submitted to the Judges, who required time to answer. Upon all these, except one, the Judges expressed a unanimous opinion against the objections raised by the defendants, and Lord *Lyndhurst* advised the House to adhere to their judgment. Lord *Denman*, Lord *Cottenham* and Lord *Campbell* delivered opinions in favour of reversing the judgment of the Court below. A discussion then arose whether the lay lords should take part in the vote. Lord *Wharnccliffe* suggested they should concur in the opinion of the majority of the law lords, but the Earl of *Stradbroke* said he had considered the subject

most attentively, and desired to give his opinion. The Marquis of Clanricarde declared that in that case he also should vote, but he thought it would be calamitous if members, not learned in the law, and who had not heard the arguments, should vote, and he hoped all such would leave the House. The Earl of Verulam then stated that he would retire, and thereupon all the lay lords withdrew. The question that the judgment be reversed was again put, when it was carried in the affirmative. This was the last case in which the lay lords asserted their right to take part in the judicial business of the House. For previous cases in which they voted on judgments of the House, see *Bishop of London v Fytche*, 2 Bro P C 211, *Hill v St John*, 3 Bro P C 375, *Ashby v White*, 2 Ld Raym 938.

Note—Stephen observes that this decision shows how wide the legal notion of a seditious conspiracy is. It includes every sort of attempt, by violent language either spoken or written, or by a show of force calculated to produce fear, to effect any public object of an evil character. But he adds no precise definition has ever been given of objects which are to be regarded as evil. All those mentioned in *O'Connell's Case* are included, but there may be others.

"In the present day," he concludes, "the law as to seditious conspiracy is of greater practical importance than the law of seditious libel. Political combinations are so common, and may become so powerful, that it seems necessary that a serious counterpoise should be provided to the exorbitant influence which in particular circumstances they are capable of exercising."

This conclusion would appear to possess even greater force to-day.

For details of the Manchester meeting in St Peter's Fields, known as the "Peterloo Massacre," see Bruton's "Three Accounts of Peterloo by Eye-Witnesses," 1921.

BLASPHEMY

Rex v. Tayler

3 *Kemble*, 607, 1 *Vent* 293 (1675)

Case] The defendant was indicted for saying "Christ is a whoremaster, and religion is a cheat, and profession a cloak, and all cheats all are mine and I am a king's son, and fear neither God, devil, nor man. I am Christ's younger brother, and that Christ is a bastard, and damn all gods of the Quakers, ' etc

In his direction to the jury, *Hale*, C J, said that although those words were of ecclesiastical cognisance, yet the allegation that religion is a cheat tends to the dissolution of all government, and such kind of wicked and blasphemous words were not only an offence against God and religion, but a crime against the law, State, and Government, and therefore punishable in this Court. An indictment lay for saying the Protestant religion was a fiction, for taking away religion all obligations to Government by oaths, etc, ceaseth, and Christian religion is part of the law itself, therefore, injuries to God are as punishable as to the King or any common person.

The defendant was found *Gilty*, and as part of his punishment had to stand in the pillory in Westminster Palace Yard, and also in the market-place at Guildford, with a paper on his head, inscribed with these words "For blasphemous words tending to the subversion of all government."

Regina v. Bradlaugh and others

15 *Cox C C* 217 (1883)

Case] Charles Bradlaugh, M P, and Ramsay and Foote were indicted for publishing blasphemous libels ' with intent

to asperse and vilify Almighty God and bring the Holy Scriptures and the Christian religion into contempt in these words, published in *The Freethinker* 'The God whom Christians love and adore is depicted in the Bible with a character more bloodthirsty than a Bengal tiger or a Bashibazouk. He is credited with all the vices and scarcely any of the virtues of a painted savage. Wanton cruelty and heartless barbarity are his essential characteristics. If any despot at the present time tried to emulate, at the expense of his subjects, the misdeeds of Jehovah, the great majority of Christian men would denounce his conduct in terms of indignation''

The application of Bradlaugh to be tried separately was granted. He was found *Not Guilty*.

Lord Coleridge's direction to the jury is substantially the same as that in the prosecution of Ramsay and Foote.

Regina v Ramsay and Foote

15 Cox C C 281 (1888)

Case.] Ramsay was the publisher and Foote the editor of *The Freethinker*, in which the alleged blasphemous libels were published. They contended that the libels were merely denials of the truth of Christianity or of the Scriptures, and ridicule of the Hebrew idea of God.

In his direction to the jury Lord Coleridge, C J, said "Now according to the old law, or the *dicta* of the Judges in old times, those passages would undoubtedly be blasphemous libels, because they asperse the truth of Christianity. But as I said in the former trial, and now repeat, I think that these old cases can no longer be taken to be a statement of the law at the present day. It is no longer true in the sense in which it was true when these *dicta* were uttered that 'Christianity is part of the law of the land'. Nonconformists and Jews were then under penal laws, and were hardly allowed

civil rights. But now, so far as I know a Jew might be Lord Chancellor. Certainly he might be Master of the Rolls, and the great Judge whose loss we have all had to deplore [Sir George Jessel] might have had to try such a case, and if the view of the law supposed be correct, he would have had to tell the jury that it was blasphemy to deny that Jesus Christ was the Messiah which he himself did deny, and which Parliament had allowed him to deny and which it was part of 'the law of the land' that he might deny. Therefore, to asperse the truth of Christianity cannot *per se*, be sufficient to sustain a criminal prosecution for blasphemy. And on the ground that in the sense understood by the Judges in former times that Christianity is part of 'the law of the land,' to suppose so is in my judgment to forget that law grows. The principles of law remain, and it is the great advantage of the common law that its principles do remain, but then they have to be applied to the changing circumstances of the times. This may be called by some retrogression, but I should rather say it is progression—the progress of human opinion. Therefore to maintain that merely because the truth of Christianity is denied without more, that, therefore, a person may be indicted for blasphemous libel is, I venture to think absolutely untrue. It is a view of the law which cannot be historically justified. Parliament, the supreme authority as to old law, has passed Acts which render the *dicta* of the Judges in former times no longer applicable. And it is no disparagement to their authority to say that observations which were made under one state of the law are no longer applicable under a different state of things. As I observed on the last occasion, and I put it as a *reductio ad absurdum*, that if it was enough to say that 'Christianity was part of the law of the land,' then there could be no discussion on any part of 'the law of the land,' and it would be impossible, for example to discuss in a grave argumentative way the question of a monarchical form of government as Harrington discussed it in his *Oceana*, without being liable to be indicted for a

seditionous libel I was not aware that what I then put as a *reductio ad absurdum* had been judicially held, and that a man had actually been convicted of a seditious libel (*R v Bedford*, Gilbert's Rep 397) for discussing such a question. His work containing, as the report states, 'no reflection whatever upon the existing Government,' no Judge or jury in our day would convict a man of seditious libel in such a case, it would be regarded as monstrous. I have no doubt, therefore, that the mere denial of the truth of Christianity is not enough to constitute the offence of blasphemy."

His lordship then adopted the following passage from Starkie's "Libel" "The law visits not the honest errors, but the malice of mankind. A wilful intention to pervert, insult, and mislead others by means of licentious and contumelious abuse applied to sacred subjects, or by wilful misrepresentations or wilful sophistry calculated to mislead the ignorant and unwary, is the test and criterion of guilt. A malicious and mischievous intention, or what is equivalent to such an intention, in law as well as in morals—a state of apathy and indifference to the interests of society—is the broad boundary between right and wrong."

The jury were unable to agree, and were discharged.

Bowman v Secular Society, Ltd

[1917] A C 406, 86 L J Ch 568

Case.] By his will, dated September 14, 1905, Charles Bowman devised and bequeathed his real and personal estate to his trustees upon trust, after the death of his wife, for sale and conversion, and to stand possessed of the proceeds, subject to certain annuities upon trust, for the Secular Society, Ltd, the respondents. His widow died in 1914. The society thereupon took out an originating summons asking for payment over to them to which they were entitled under

the will. The next-of-kin, the appellants, disputed the validity of the residuary gift, on the ground that the objects of the society were unlawful. The society was registered as a limited company in 1898 under the Companies Acts, and the main object was 'to promote the principle that human conduct should be based upon natural knowledge, and not upon supernatural belief, and that human welfare in this world is the proper end of all thought and action.' *Joyce, J.*, held that there was nothing in either the memorandum or articles of association subversive of morality or contrary to law, and that the gift was valid. This decision was affirmed by the Court of Appeal.

Held by the House of Lords, that assuming the objects of the society to involve a denial of Christianity, (1) that they were not criminal, inasmuch as the propagation of anti-Christian doctrine, apart from scurrility or profanity, did not constitute the offence of blasphemy, and (2) (by Lords *Dunedin, Parker, Sumner* and *Buckmaster*, Lord *Finlay*, L.C., dissenting) that they were not illegal in the sense of rendering the society incapable in law of acquiring property by gift, and that it was accordingly valid.

In his judgment Lord *Sumner* gives a very full summary and criticism of the authorities. "If," he asked, "the respondents are an anti-Christian society, is the maxim that Christianity is part of the law of England true, and, if so, in what sense? If Christianity is of the substance of our law, and if a Court of law must, nevertheless, adjudge possession of its property to a company whose every action seeks to subvert Christianity and bring that law to naught, then by such judgment it stultifies the law. So it was argued, and, if the premise is right, I think the conclusion follows.

"It is not enough to say with Lord Coleridge, C.J., in *Ramsay's Case*, that this maxim has long been abolished, or with Lord Cozens-Hardy, M.R., in the Court below, that the 'older view,' based on this maxim, 'must now be regarded as obsolete.' If that maxim expresses a positive rule of law,

once established, though long ago, time cannot abolish it nor disfavour make it obsolete. The decisions which refer to such a maxim are numerous and old, and although none of them is a decision of this House, if they are in agreement, and if such is their effect, I apprehend they would not now be overruled, however little reason might incline your lordships to concur in them. In what sense then was it ever a rule of law that Christianity is part of the law?

"The legal material is fourfold (1) Statute law, (2) the criminal law of blasphemy, (3) general civil cases, (4) cases relating to charitable trusts. From statute law little is to be gleaned. During the sixteenth century many Acts were passed to repress objectionable doctrines, but, plainly, statutes were not needed if the common law possessed an armoury for the defence of Christianity as part and parcel of itself. Indeed, who but the King in Parliament could then say whether Christianity, which for the time being formed part of the common law, was the Christianity of Rome, or of Geneva, or Wittenberg? Certainly the Courts could not.

"After the Revolution of 1688 there were passed the Toleration Act to give 'some ease to scrupulous consciences in exercise of religion,' which upon conditions relieved certain dissenters (Papists and those who denied the Trinity excepted) from the operation of various existing statutes, and the Blasphemy Act, which recites that 'many persons have of late years openly avowed and published many blasphemous and impious opinions, contrary to the doctrines and principles of the Christian religion and may prove destructive to the peace and welfare of this kingdom.' That the Blasphemy Act simply added new penalties for the common-law offence of blasphemy, when committed under certain conditions, was held by Lord Hardwicke in *De Costa v De Paz* (1743), 2 Swanst 487, n (a), and by the Court of King's Bench in *Richard Carlisle's Case* (1819), 3 B & Al 161, 22 R R 333, and Lord Eldon in *Att-Gen v Pearson* (1817), 3 Mer 353, 17 R R 100, said that the Toleration Act left the common law

as it was, and only exempted certain persons from the operation of certain statutes. Such, indeed, is the clear language of the statutes, nor can the fact that persons are singled out for special punishments who deny the God-head of the Three Persons of the Trinity, the truth of the Christian religion, and the Divine authority of the Holy Scriptures, or who maintain that there be more gods than one, be accepted as showing that the common-law offence of blasphemy consists in such denials and assertions, and in nothing else. Later Acts have relieved various religious confessions from the burthen of the Blasphemy Act and other statutes, but except so far as they deal with charitable trusts for the purposes of such confessions, on which I do not now dwell, they seem to carry the present matter no further.

“The common law as to blasphemous libels was first laid down after the Restoration, and here the statement that Christianity is part of the law is first found as one of the grounds of judgment.”

After referring to some earlier authorities his Lordship continued: “Evidently in this interval the spirit of the law had passed from the Middle Ages to modern times.” So far it seems to me that the law of the Church, the Holy Scriptures and the law of God are merely prayed in aid of the general system or to give respectability to propositions for which no authority in point could be found.

“At the beginning of the seventeenth century a considerable change of procedure took place in reference to religion. Legate was burnt at Smithfield in 1612 upon a writ *de hæretico comburendo*, and another heretic, named Wightman, at Lichfield about the same time, but they were the last persons to go to the stake in this country *pro salute animæ*. No doubt this process was moribund. Before the Restoration the Court of Star Chamber and the Court of High Commission had been suppressed, and at length, by the statute 29 Car. 2, c. 9, the writ *de hæretico comburendo* itself was abolished, with all process and proceedings thereupon and all punish-

ment of death in pursuance of any ecclesiastical censures. It is to be noted that the Act, in saving the jurisdiction of the Ecclesiastical Courts over 'atheism, blasphemy, heresy or schism,' distinguishes blasphemy from the profession of false doctrines, whether atheistical or heretical. The time of Charles II was one of notorious laxity both in faith and morals, and for a time it seemed as if the old safeguards were in abeyance or had been swept away. Immorality and irreligion were cognisable in the Ecclesiastical Courts, but spiritual censures had lost their sting and those civil Courts were extinct which had specially dealt with such matters viewed as offences against civil order.

"The Court of King's Bench stepped in to fill the gap. In 1663 Sir Charles Sedley was indicted for indecency and blasphemy, 1 Sid 168, 17 St Tr 155. The indecency was so gross that little stress was laid on the blasphemy, which was probably both tipsy and incoherent. The Court told the prisoner that they would have him know that, although there was no longer any Star Chamber, they acted as *custos morum* for all the King's subjects, and it was high time to punish such profane actions, contrary alike to modesty and to Christianity.

"Then follows *Tayler's Case* in 1675, when the indictment was for words only, though ribald and profane enough. This is the earliest trial for blasphemy. *Adwood's Case*, 2 Roll Abr 78, in 1617 is not an instance. It is like *Traske's Case* (1618), Hob 236, where the matter in hand was the making of conventicles as tending to sedition. The indictment in *Tayler's Case* is given in Tremaine's Placita, p 226, and shows that the charge was not confined to the fact that Tayler's language was contrary to true religion, but that it was considered dangerous to civil order, for it concludes 'Ad grave scandalum professionis veræ Christianæ religionis in destructionem Christianæ gubernationis et societatis contra pacem dicti domini regis.'

"Now *Tayler's Case* is the foundation-stone of this branch

of the law, and for a century or so there is no sign of carrying the law beyond it. The case repays scrutiny. The objection that the offence was an ecclesiastical one lay on the very face of the words charged, and in directing the jury, Hale, C J, found it necessary to show why it was also a civil offence. He said that such kind of wicked, blasphemous words, though of ecclesiastical cognisance, were not only an offence to God and religion, but a crime against the laws, State and Government and 'therefore punishable in this Court. For to say religion is a cheat, is to dissolve all those obligations whereby the civil societies are preserved.' It is true that he added that Christianity was parcel of the laws of England, 'and therefore to reproach the Christian religion is to speak in subversion of the law,' but this does not really enlarge the previous statement. Speaking in subversion of the law, without more, in the sense of saying that particular laws are bad, and should be mended, has never been a criminal offence, and agitating against them has often led to fortune. *Woolston's Case*, 1 Fitzg 64, 2 Str 834, in 1728, supplies the completion of the doctrine. Upon a motion in arrest of judgment the Court followed *Tayler's Case* as settled law. The argument was that Woolston's crime, if any, was of ecclesiastical cognisance (he was a clergyman who joked about the miracles), and that 'mere difference of opinion is tolerated by law.' Lord Raymond's answer was, 'I would have it taken notice of, that we do not meddle with any difference in opinion, and that we interfere only where the very root of Christianity is itself struck at. To say, an attempt to subvert the established religion is not punishable by those laws upon which it is established is an absurdity.' True it is that the last words somewhat invert Lord Hale's reasoning, for they seem to treat an attempt to subvert the established form of Christianity (not any other) as an offence because it attacks the creature of the law, not because that form is the basis of the law itself and the bond of civilised society. At any rate the case leaves untouched mere differences of opinion.

not tending to subvert the laws and organisation of the realm

"*Curl's Case* (1727), 2 Str 788, 1 Barn K B 29, heard about the same time, was a case for publishing an obscene libel, but is of some incidental importance. The Courts were chary of enlarging their jurisdiction in this regard and in Queen Anne's time judgment had been arrested in such a case for supposed want of precedent, and offence was treated as one for ecclesiastical cognisance only. On a motion for arrest of judgment on *Curl* it was argued that the libel, being only *contra bonos mores*, was for the spiritual Courts. The motion was refused, the Chief Justice saying 'If it reflects on religion, virtue or morality, if it tends to disturb the civil order of society, I think it is a temporal offence'. He said too 'religion is part of the common law,' but Probyn, J, clears this up, adding, 'It is punishable at common law as an offence against the peace in tending to weaken the bonds of civil society.'

"At the end of the eighteenth and beginning of the nineteenth centuries various publishers of Paine's '*Age of Reason*' were prosecuted. The words indicted were chosen for their scoffing character, and indeed are often really blasphemous, but the idea throughout is that the book was the badge of revolution and tended to jeopardise the State. Thus in the trial of Williams (1797), 26 St Tr 653, *Ashhurst*, J, passing sentence on him in the Court of King's Bench, stated the ground of this offence thus 'All offences of this kind are not only offences to God, but crimes against the law of the land, and are punishable as such, inasmuch as they tend to destroy those obligations whereby civil society is bound together, and it is upon this ground that the Christian religion constitutes part of the law of England.'

"If later cases seem to dwell more on religion and less on considerations of State, I think, when examined, they prove to be of small authority. In *Waddington's Case* (1822), 1 B & C 26, 1 L J K B 37, 25 R R 288, there seems to

have been little argument and no decisions were cited. *Rea v Davison* (1821), 4 B & Al 329, 23 R R 295, decides in effect that contempt of God in Court may be also contempt of Court. In 1838 Alderson, B, told a York jury (*Reg v Gathescole* (1838), 2 Lew 237) that 'a person may, without being liable to prosecution for it, attack Judaism or Mahomedanism or even any sect of Christian religion (save the established religion of the country), and the only reason why the latter is in a different situation from the others is because it is the form established by law, and is therefore a part of the constitution of the country. In like manner, and for the same reason, any general attack on Christianity is the subject of criminal prosecution, because Christianity is the established religion of the country'. The defendant, in fact, had not made any general attack on Christianity, but, being a Protestant clergyman, had foully aspersed a Roman Catholic nunnery. Whether this strange dictum was material or not, and whether it is right or not (and Baron Alderson's is a great name), it only shows that the gist of the offence of blasphemy is a supposed tendency in fact to shake the fabric of society generally. Its tendency to provoke an immediate breach of the peace is not the essential, but only an occasional, feature. After all, to insult a Jew's religion is not less likely to provoke a fight than to insult an Episcopalian's, and on the other hand, the publication of a dull volume of blasphemies may well provoke nothing worse than throwing it into the fire.

"*Hetherington's Case* (1840), 4 St Tr (N S) 563, 62 R R 839, was a motion in arrest of judgment. Even here alongside of the proposition that the Old Testament contains the law of God and that 'it is certain that the Christian religion is part of the law of the land' (per *Patteson*, J) we find Lord *Denman*, C J, saying 'As to the argument that the relaxation of oaths is a reason for departing from the law laid down in the old cases, we could not accede to it without saying that there is no mode by which religion holds

society together but the administration of oaths, but that is not so, for religion contains the most powerful sanctions for good conduct' *Reg v Moxon* (1841), 4 St Tr (N S) 693, is of small authority. Later prosecutions add nothing until Lord Coleridge's direction to the jury in *Reg v Ramsay and Foote* (1883), 15 Cox, C C 231. For thirty years this direction has been followed, nor was it argued by the appellants that the publication of anti-Christian opinions, without ribaldry or profanity, would now support a conviction for blasphemy. It is no part of your Lordships' task on the present occasion to decide whether Lord Coleridge's ruling was or was not the last word on the crime of blasphemy, but the history of the cases and the conclusions at present reached go to show that what the law censures or resists is not the mere expression of anti-Christian opinion, whatever be the doctrines assailed or the arguments employed.

"It is common ground that there is no instance recorded of a conviction for a blasphemous libel, from which the fact, or at any rate the supposition of the fact, of contumely and ribaldry has been absent, but this was suggested to be of no real significance for these reasons. Such prosecutions, it was said, often seem to be persecutions and are therefore unpopular, and so only the gross cases have been proceeded against. This explains the immunity of numerous agnostic or atheistic writings so much relied on by secularists. All it really shows is that no one cares to prosecute such things till they become indecent, not that decently put, they are not against the law. Personally I doubt all this. Orthodox zeal has never been lacking in this country. The Society for Carrying into Effect His Majesty's Proclamations against Vice and Immorality, which prosecuted Williams in 1797, has had many counterparts both before and since, and as anti-Christian writings are all the more insidious and effective for being couched in decorous terms, I think the fact that their authors are not prosecuted, while ribald blasphemers are, really shows that lawyers in general hold such writings to be

lawful because decent, not that they are tolerable for decency though unlawful in themselves. In fact, most men have thought that such writings are better punished with indifference than with imprisonment " "

OBSCENITY

Regina v. Hicklin

L R 3 Q B 360, 37 L J M C 89 (1868)

Case.] Henry Scott was a metal broker of respectable position and character. He was a member of "The Protestant Electoral Union," whose objects were "to protest against those teachings and practices which are un-English, immoral and blasphemous, to maintain the Protestantism of the Bible and the liberty of England" and "to promote the return to Parliament of men who will assist them in these objects and particularly will expose and defeat the deep-laid machinations of the Jesuits and resist grants of money for Romish purposes." Scott, from time to time, purchased from the Union copies of a pamphlet, "The Confessional Unmasked, showing the depravity of the Romish priesthood, the iniquity of the Confessional, and the questions put to females in confession." He sold copies at cost price to any who applied. Upon complaint an order was made by two Justices under 20 & 21 Vict c 83 to seize and destroy the pamphlets. Upon appeal to quarter sessions the Recorder was of opinion that, under those circumstances, the sale and distribution of the pamphlets was not unlawful within the meaning of the statute. He therefore quashed the order and directed the pamphlets to be returned to the appellant Scott, subject to the opinion of the Court of Queen's Bench.

Judgment — The Court — *Cockburn, C J, Blackburn, Mellor and Lush, JJ* — reversed the Recorder's decision and confirmed the order of the Justices. In the course of his judgment the Chief Justice said "I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are

open to such immoral influences, and into whose hands a publication of this sort may fall. Now with regard to this work, it is quite certain that it would suggest to the minds of the young of either sex or even to persons of more advanced years thoughts of a most impure and libidinous character. The very reason why this work is put forward to expose the practices of the Roman Catholic confessional is the tendency of questions, involving practices and propensities of a certain description, to do mischief to the minds of those to whom such questions are addressed, by suggesting thoughts and desires which otherwise would not have occurred to their minds. If that be the case as between the priest and the person confessing it manifestly must equally be so when the whole is put into the shape of a series of paragraphs, one following upon another, each involving some impure practices, some of them of the most filthy and disgusting and unnatural description it is possible to imagine. I take it therefore that apart from the ulterior object which the publisher had in view, the work itself is, in every sense of the term, an obscene publication, and that, consequently, as the law of England does not allow of any obscene publication, such publication is indictable. We have it therefore that the publication itself is a breach of the law. But then it is said for the appellant,

Yes but his purpose was not to deprave the public mind, his purpose was to expose the errors of the Roman Catholic religion especially in the matter of the confessional. Be it so. The question then presents itself in this simple form may you commit an offence against the law in order that thereby you may effect some ulterior object which you have in view, which may be an honest and even a laudable one? My answer is emphatically, no. The law says you shall not publish an obscene work. An obscene work is here published, and a work the obscenity of which is so clear and decided that it is impossible to suppose that the man who published it must not have known and seen that the effect upon the minds of many of those into whose hands it would come would

be of a mischievous and demoralising character. Is he justified in doing that which clearly would be wrong, legally as well as morally, because he thinks that some greater good may be accomplished? I am of opinion, as the learned Recorder has found, that this is an obscene publication. I hold that where a man publishes a work manifestly obscene, he must be taken to have had the intention which is implied from that act, and that, as soon as you have an illegal act thus established, *quoad* the intention and *quoad* the act, it does not lie in the mouth of the man who does it to say, 'Well I was breaking the law, but I was breaking it for some wholesome and salutary purpose.' The law does not allow that, you must abide by the law, and if you would accomplish your object, you must do it in a legal manner or let it alone, you must not do it in a manner which is illegal."

OFFICIAL SECRETS

Rex v Olsson

31 T L R 559 (1915)

Case] The appellant, who had been convicted under section 1, sub-section 1, and section 4 of the Official Secrets Act, 1911, of attempting, for a purpose prejudicial to the safety or interests of the State, to obtain information calculated to be useful to the enemy, appealed against his conviction on the grounds (1) that evidence of a conversation which he had had after the date of the offence had been wrongly admitted, (2) that the trial had been prejudiced by a suggestion as to the contents of a document which was not put in evidence, and (3) that the Judge had unfairly questioned the prisoner and misunderstood his answers

The appellant was a Swedish subject who endeavoured to obtain information about the disposition the British naval and military forces and the defences of the Humber from another Swede named Erlander, living at Grimsby. This attempt was made during a conversation with Erlander on March 16 and was repeated on March 23. This was the offence charged. Subsequently another conversation took place on April 7 in which reference was made to the previous conversation.

Judgment—The appeal was dismissed by the Court of Criminal Appeal on all three grounds. In the conversation of March 23 the appellant referred to his German friends, and in that of April 7 he stated his friends were masters of big German liners laid up at Rotterdam. Upon that ground alone the evidence was admissible. As to the second ground the document was produced but was not put in as the Judge said if it was put in he would allow the defence

to cross-examine, even though such cross-examination might be prejudicial to the public interest. The contents of the document were not disclosed. In the discussion as to the admissibility of the document some reference was made by the prosecution to naval signalling, but there was nothing to inform the jury that that was what the document referred to, and the Judge told the jury that they must not assume that there was anything in the document because there could not be cross-examination on it. The Judge had been scrupulously fair to the appellant.

Rex v. Crisp and Homewood.

88 J P 121 (1919)

Case] The defendants were indicted for unauthorised communication of official information contrary to section 2, sub-section 1 (a) of the Official Secrets Act, 1911, and receiving official information contrary to section 2, sub-section 2 of the same statute. Crisp, a War Office clerk having in his possession or control certain information containing particulars of contracts between the War Office and divers contractors for clothing, which information he had obtained owing to his position in the War Office, was charged with communicating such information to a person other than a person to whom he was authorised to communicate it, viz, to Homewood. The latter was charged with receiving the information, knowing or having reasonable grounds for believing that such information was communicated to him in contravention of the statute. It was contended for the defendants that the documents were not confidential and were not secret.

Avory, J., ruled that there was evidence that Crisp, having in his possession information which he had obtained owing to his position as a person who held office under His Majesty, communicated it to a person other than a person to whom he was authorised to communicate it. If there was evidence of that he came within section 2 of the statute, which went

further than the statute of 1889. The earlier statute was limited to espionage. The present statute extends the prohibition to information or documents which either have been entrusted in confidence to any person holding office under His Majesty, or which he had obtained owing to his position as a person holding office under His Majesty. It was not necessary therefore to show that these documents had been entrusted specially in confidence to Crisp. It was sufficient if it was shown that he obtained the documents owing to his position. Where there was no ambiguity in the enacting part of the statute, the words could not be altered or limited merely by the title "Official Secrets," but even if this were done there was evidence that these documents were official secrets. There was *prima facie* evidence that Homewood had reasonable ground to believe that the information was being communicated to him in contravention of the Act.

The defendants therefore pleaded *Guilty* to those charges, the prosecution stating that there was no suggestion of corrupt motives.

Rex v Simington.

[1921] 1 K B 451, 90 L J K B 471, 15 Cr App R 97

Case] The defendant was convicted of larceny of plans and tracings belonging to the Office of Works, where he was employed as a clerk, and of wrongfully retaining such plans contrary to the Official Secrets Act, 1911, s 2, sub-s 1 (b), which he had obtained owing to his position as a person holding office under His Majesty. The defendant appealed on the ground (*inter alia*) that *McCardie*, J, was wrong in law in holding that section 2 of the Act was applicable to plans other than plans of "prohibited places" within the meaning of section 3. Section 2 provides "If any person having in his possession or control any sketch, plan, model, article, note, document or information which relates to or is used in a prohibited place or anything in such a place, or which has been

made or obtained in contravention of this Act, or which has been entrusted to him by any person holding office under His Majesty or which he has obtained owing to his position as a person who holds or has held office under His Majesty, or as a person who is or has been employed under a person who holds or has held such an office or contract,—(a) communicates the sketch, etc., to any person, other than a person to whom he is authorised to communicate it, or a person to whom it is in the interest of the State his duty to communicate it, or (b) retains the sketch, etc., in his possession or control when he has no right to retain it or when it is contrary to his duty to retain it, that person shall be guilty of a misdemeanour.” The plans were those of buildings at Westminster, which had been used by the Explosives Department of the Ministry of Munitions and by the Overseas Board, which were “prohibited places” within section 3

Held by the Court of Criminal Appeal that the words ‘which relates to or is used in a prohibited place or anything in such a place’ belong to the first of the alternative provisions of the clause only, and are not to be read into any of its subsequent alternative provisions beginning with the words “or which”, and consequently it is an offence for a person to have in his possession and to retain any sketch, etc (i) which relates to a prohibited place, (ii) which has been made or obtained in contravention of the Act, (iii) which has been entrusted in confidence to him by any person holding office under His Majesty, or (iv) which he has obtained as a person who holds or has held office under His Majesty, or a contract on behalf of His Majesty, or a person who is or has been employed under a person so holding office or a contract

The conviction and sentence were affirmed

TRADE UNIONS

Lyons v Wilkins.

[1896] 1 Ch 811, 65 L J Ch 601, [1899] 1 Ch 255,
68 L J Ch 146

Case] Upon motion in the action the plaintiffs, J Lyons & Sons, leather bag and portmanteau manufacturers, claimed an injunction to restrain the defendants, P C Wilkins, the secretary, and Charles Clarke, a member of the executive committee of a trade union called the Amalgamated Trade Society of Fancy Leather Workers, from unlawfully and maliciously procuring or conspiring to procure persons to break contracts with the plaintiffs and from unlawfully and maliciously inducing or conspiring to induce persons not to enter into contracts with the plaintiffs, to restrain libel, and damages

Upon the failure of negotiations to alter the terms of employment the executive committee of the society ordered a strike at the plaintiffs' works, and several workmen gave notice and ceased work, and the works were picketed by persons employed by the executive committee. The pickets were furnished with cards, headed with the name of the society, containing the words "Dear Sir,—You are hereby requested to abstain from taking work from Messrs J Lyons & Sons, Redcross Street, E C, pending a dispute. Members are also requested to use their influence to keep non-society men, stitchers and machinists, etc, from applying for work until the dispute is ended."

The pickets accosted persons entering and leaving the plaintiffs' premises, tried to persuade them not to work for the plaintiffs and gave them some of the cards. On one occasion

they opened a bag carried by an errand-boy, who was taking goods to the plaintiffs, and on one or two occasions followed persons into the plaintiffs' works. Among other letters written by the defendant Wilkins was one to the mother of a girl employed by the plaintiffs, to get the mother's influence in urging her daughter to give up work, stating "The recollection of her assisting the employer against her fellow-workers will remain a long time." The executive committee endeavoured to get one Schoenthal, a sub-manufacturer for the plaintiffs, to cease to do work for the plaintiffs, and on his failing to do so, ordered a strike of and picketed his works. Another sub-manufacturer Scott was threatened with similar proceedings.

Judgment—The Court of Appeal (affirming *North*, J) held that this kind of picketing and the strike against Schoenthal for the indirect purpose of injuring the plaintiffs were illegal acts, and they granted an interlocutory injunction restraining the defendants and their agents from watching and besetting the plaintiffs' works for the purpose of persuading or otherwise preventing persons from working for them, or for any purpose except merely to obtain or communicate information, and also restraining the defendants from preventing Schoenthal from working for the plaintiffs by withdrawing his or their workmen from their employment. In his judgment *Lindley*, L J, said "Parliament has not yet conferred upon trade unions the power to coerce people, and to prevent them from working for whomsoever they like upon any terms they like, and yet in the absence of such a power it is obvious that a strike may not be effective, and may not answer its purpose. Some strikes are perfectly effective by virtue of the mere strike, and other strikes are not effective unless the next step can be taken, and unless other persons can be prevented from taking the place of the strikers. Until Parliament confers on trade unions the power of saying to other people 'You shall not work for those who are desirous of employing you upon such terms as you and they may mutually agree upon,' trade

unions exceed their power when they try to compel people not to work except on the terms fixed by the unions. I need hardly say that up to the present time no such power as that exists.

Trade unions have now been recognised up to a certain point as organs for good. They are the only means by which the workmen can protect themselves from tyranny on the part of those who employ them, but the moment that trade unions become tyrants in their turn they are engines for evil. They have no right to prevent any man from working upon such terms as he chooses."

His lordship then dealt with sections 3 and 7 of the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), of which he understood the meaning to be as follows: "That every person who, with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority watches or besets the house or other place where such other person, and so on, shall on conviction be liable to a penalty, but in construing this language and giving effect to it, the Courts are not to treat as 'watching and besetting' any 'attending at or near a house in order merely to obtain or communicate information.' That is to be allowed, and picketing (if you call it so) for that limited purpose and conducted in that way for that simple object is not made a criminal offence, and must therefore be taken to be a lawful act. Accordingly, one cannot say as an abstract proposition that all picketing is unlawful, because if all that is done is attending at or near a house in order merely to obtain or communicate information, that is lawful. But it is easy to see how, under colour of so attending, a great deal may be done which is absolutely illegal. It would be wrong to post people about a place of business or a house under pretence of merely obtaining or communicating information, if the object and effect were to compel the person so picketed not to do that which he has a perfect right to do, and it is because this proviso is often

abused and used for an illegal purpose that such disputes as these very often arise ”

Upon the trial of the action *Byrne, J* , held that the plaintiffs were entitled to a perpetual injunction upon the terms of the interlocutory injunction, and awarded £5 damages in respect of the libel, but refused the further claim for an injunction to restrain the defendants from maliciously inducing or conspiring to induce persons not to enter into contracts with the plaintiffs in view of the decision of the House of Lords, in *Allen v Flood*, [1898] A C 1, 67 L J Q B 119, which determined that the existence of a malicious motive cannot in such a case as this render unlawful an act or acts otherwise lawful. Apart from this latter point it was held by the Court of Appeal that the decision of the Court of Appeal upon the motion was not overruled by *Allen v Flood*, and the decision of *Byrne, J* , was affirmed

Note—By section 3 of the Conspiracy and Protection of Property Act, 1875, “ An agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute [between employers and workmen] ¹ shall not be indictable as a conspiracy if such act committed by one person would not be punishable as a crime ” By section 7 “ Every person who with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority—(1) uses violence to or intimidates such other person or his wife or children, or injures his property, or (2) persistently follows such other person about from place to place; or (3) hides any tools, clothes, or other property owned or used by such other person, or deprives him of or hinders him in the use thereof, or (4) watches or besets the house or other place where such other person resides, or works, or carries on business or happens to be, or the approach to such house or place, or (5) follows such other person with two or more other persons in a disorderly manner in or through any street or road, shall on conviction thereof be liable,” etc

The last paragraph is repealed by the Trade Disputes Act, 1906,

¹ The words in brackets are repealed by the Trade Disputes Act, 1906, whereby trade disputes include disputes between workmen and workmen as well as between employers and workmen

which substitutes for it section 2, sub-section 1 "It shall be lawful for one or more persons acting on their own behalf or on behalf of a trade union or of an individual employer or firm in contemplation or furtherance of a trade dispute, to attend at or near a house or place where a person resides or works or carries on business or happens to be, if they so attend merely for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or abstain from working"

In *Charnock v Court*, [1899] 2 Ch 35, 68 L J Ch 550, where two agents of a trade union attended at a public landing stage unconnected with the works of the plaintiffs for the purpose of advising certain workmen, who were to arrive there from Ireland, not to enter plaintiffs' employ on account of a strike at the plaintiffs' works, *Stirling, J*, held this to be "watching and besetting" within section 7, and illegal, because they did something more than "obtain or communicate information" And in *Walters v Green*, [1899] 2 Ch 696, 68 L J Ch 730, where the watching and besetting took place at railway stations in Hull, the same conclusion was reached In *R v Wall*, 21 Cox C C 401, the defendants were indicted under section 7 of the Act of 1875 for persistently following the employer and watching his place of business and his private residence with a view to coerce him to take back a dismissed employee, the evidence being that the defendants, with other persons, had continuously watched and walked up and down before the complainant's business premises, and had followed him through the streets to his residence It was held that if the acts of "watching" and "persistently following" were done with the intent to coerce the employer to take back the discharged employee, the defendants ought to be found guilty Watching involved persistent watching The defendants relied on section 2 of the Act of 1906 "To attend at the house for the purpose of peaceably persuading the employees to abstain from working" But a "mere attending" is more temporary than "watching" And there were no workmen there to be persuaded The defendants were found guilty of "persistently following" It is submitted that the same ruling would be equally applicable in a civil action for damages and an injunction The provision in section 2 of the Trade Disputes Act, 1906, by which the picket may now "peacefully persuade any person to work or abstain from working" is largely illusory Obstruction of the highway or of the premises, or the presence of numbers or their demeanour or conduct which a Judge or jury might regard as intimidation remains actionable, and in some cases criminal

Linaker v. Pilcher and others

70 L J K B 396, 84 L T 421 (1901)

Case] The plaintiff was a district superintendent in the employ of the London and North Western Ry Co at Manchester. The defendants were the trustees of the Amalgamated Society of Railway Servants. The society was registered under the Trade Union Acts, 1871 and 1876, and with the trustees were proprietors and publishers of the *Railway Review*, in which the plaintiff was charged with drunkenness. In the action for libel the defendants pleaded justification and objected that as a matter of law they could not be sued in their capacity of trustees so as to bind the society or its property. The jury found a verdict for the plaintiff for £1,000 damages, and the question whether the funds of the society were liable was waived.

Judgment —“It was asked,” said *Matthew, J.*, “for what reason was it said that the society was not to be responsible as any ordinary *cestuis que trust* would be? No answer was given to that question upon any principle of law, but it was said that if the Trade Union Act of 1871 be carefully examined there will appear to be clear indication that a trade union was never intended to be made responsible in respect of a cause of action against their trustees, however clearly that cause of action may have arisen within the limits of the trust and by reason of the position in which the trustees have been placed by their principals. In support of that argument attention was called to section 9 of the Trade Union Act, 1871. That statute in section 8 contained the provision which is the provision for vesting the property. That is followed by section 9, and my attention was called to that section as containing this very important provision, as it was suggested, for the protection of trade unions. Certainly, if the contention was well founded it was a very important point in the interests of trade unions, because it would follow that

for any breach of contract or for any tort committed by them, for which their trustees were liable, the society were free of any liability and enjoyed complete immunity. The first part of section 9 provides thus: 'The trustees of any trade union registered under this Act, or any other officer of such trade union, who may be authorised so to do by the rules thereof are hereby empowered to bring or defend or cause to be brought or defended, any action, suit, prosecution, or complaint, in any court of law or equity, touching or concerning the property, right or claim to property of the trade union.' It was said that this provision applied to specific property only, consequently the liability would fall upon the trustees or the executive committee and could not be transferred to their principals. There seems to me to be no reason why there should be this disability imposed upon the trustees in respect of anything but specific property, and it is difficult to conjecture why any such meaning should be attributed to the Legislature, and I am satisfied there was no such intention. In my opinion 'property' in section 9 of the Act of 1871 means property generally, and I think that an action to add to the assets of the society—for instance an action brought for breach of contract entered into, on behalf of the society—would be an action 'touching or concerning the property of the trade union.' So an action that threatened the assets of the society by a claim for damages, as in this case, would be an action that touched and concerned the property of the society."

It was also said that for a trade union to carry on a paper was *ultra vires*. But since the trustees of the union carried on the paper not for profit nor as a trading adventure, but for the purpose of improving the condition and protecting the interests of the members in accordance with rules and objects of the union, the learned Judge *held* that such trustees might be sued in their capacity of trustees for a libel published in the newspaper, as the action was one "touching or concerning the property" of the union. The paper was within the objects

of the union and therefore, carrying it on was not *ultra vires*. The defendants were, in their position as trustees, entitled to be indemnified out of the funds of the union

Note—Where, however, the publication of a newspaper was not within any of the objects as defined by its rules, such publication was held to be *ultra vires* and the members of the executive council responsible for the publication were personally liable to repay the amount expended to the funds of the society, see *Bennett v National Amalgamated Society of Operative House and Ship Painters and Decorators* (1915), 113 L T 808, 85 L J Ch 289, *Carter v United Society of Boultonmakers* (1916), 113 L T 1152, 85 L J Ch 298 n

Amalgamated Society of Railway Servants v Osborne

[1909] 1 Ch 163, [1910] A C 87, 79 L J Ch 87

Case.] The society was a trade union established in 1872 and registered under the Trade Union Act, 1871. Its objects were “To improve the condition and protect the interests of its members, to endeavour to obtain and maintain reasonable hours of duty and fair rates of wages, to promote a good understanding between employers and employed, the better regulation of their relations, and the settlement of disputes between them by arbitration or failing arbitration by other lawful means, to provide temporary assistance to members when out of employment through causes over which they have no control, or through unjust treatment, to provide legal assistance when necessary in matters pertaining to the employment of members or for securing compensation for members who suffer injury by accidents in their employment occasioned by the negligence of their employer or of those for whom their employer is liable, to aid the young orphan children of all members, and to use every effort to provide for the safety of railway work and of railway travelling, to provide a grant of money in case of members permanently disabled or killed by accident, or when by reason of old age they cannot follow their

regular employment, also to enable such members as voluntarily desire it to provide funds for their relief in sickness or temporary disablement, and for their respectable interment "

In 1903 words were added to the objects "to secure parliamentary representation " In 1902 a body called the Labour Representation Committee was formed for the purpose of establishing a distinct Labour group in Parliament, and to this the society became affiliated, paying an annual fee of 10s for each 1,000 members Subsequently the rules of the society were revised By Rule XIII, sect IV, provision was made for the maintenance of parliamentary representation by compulsory levies upon the members of the society, all parliamentary candidates being required to sign and accept the conditions of the Labour Party and be subject to their whip and such candidate when elected to Parliament to be paid by the society The rules as revised had been duly registered under the Trade Union Acts, 1871 and 1876, and a certificate given by the Registrar Osborne, the plaintiff in the case, was a member of the society and he sought to obtain a declaration that the rule requiring compulsory payment for parliamentary representation was invalid *Neville, J*, feeling himself bound by *Steele v South Wales Miners' Federation* (1907), 76 L J K B 333, 1 K B 361, that the provision of a parliamentary representation fund was within the scope of a trade union held that the certificate of the Registrar was conclusive Upon appeal this case was overruled and the Registrar's certificate held not to be conclusive

Judgment —The questions argued in the House of Lords were two (1) whether or not Rule XIII was *ultra vires*, and (2) whether the acceptance by parliamentary candidates of the conditions contained in the constitution of the Labour Party referred to in the rules and of subjection to their whip was not an agreement illegal and void as contrary to public policy But it was not contended, as it was in the Court of Appeal, that the amended rules were validated by registration Upon the second question Lords *Halsbury, Macnaghten*

and *Atkinson* declined to express any opinion. But Lord *James* of Hereford was of opinion that the rule "All candidates shall sign and accept the conditions of the Labour Party and be subject to their whip" is not within the power of a trade union. And Lord *Shaw*, in a characteristic judgment, went further and held that the real question at issue was the legality of the additions to the rules contained in Rule XIII. "The position," said Lord *Shaw*, "of a member of Parliament supported by the contributions of the society is accordingly this. As stated, (1) he is by the society's rules 'responsible to' as well as paid by the society, (2) he must have as a candidate signed and accepted the conditions of the Labour Party, (3) while that party has its own policy he must accept its constitution and 'agree to abide' by the decisions of the parliamentary party in carrying out the aims of the constitution. Under these aims the first object of the constitution must be included, namely, maintaining the Parliamentary Labour Party's own policy. Unless a member becomes bound to the society and to the Labour Party by these conditions, and shapes his parliamentary actions in conformity therewith and with the decisions of the parliamentary party, he has broken his bargain. Take a testing instance: should his view as to right and wrong on a public issue as to the true line of service to the realm, as to the real interests of the constituency which has elected him, or even of the society which pays him, differ from the decision of the parliamentary party and the maintenance by it of its policy, he has come under a contract to place his vote and action into subjection not to his own convictions, but to their decisions. My Lords, I do not think that such a subjection is compatible either with the spirit of our parliamentary constitution or with that independence and freedom which have hitherto been held to lie at the basis of representative government in the United Kingdom.

"I should be sorry to think that these considerations are not quite elementary. And they apply with equal force not

to labour organisations alone, which operate by administering—under, it may be, careful supervision—the subscriptions of its members, but with even greater force to individual men, or organisations or trusts of men using capital funds to procure the subjection of members of Parliament to their commands. In this latter case, indeed, adhesion to the principle is of a value all the greater because its violation might be conducted in secret. It needs little imagination to figure the peril in which parliamentary government would stand, if, either by the purchase of single votes, or by subsidies for regular support, the public well-being were liable to betrayal at the command and for the advantage of particular individuals or classes.”

On this point his Lordship cited Coke, 4 Inst 14 “ Though one be chosen for one particular county or borough yet when he is returned and sits in Parliament he serveth for the whole realm,” and 3 Edw 1, c 5 “ And because elections ought to be free, the King commandeth upon great forfeitures that no man by force of arms nor by malice or menacing, shall disturb any to make free election ”

These protections of free elections would be a mockery if the representative so elected were bound under a contract to submit his vote, advice and action for salary and at peril of loss, to the judgment of others. Locke, in his second Essay on Civil Government, clearly discerned the interrelation of these two things, when he said, speaking of the action of the magistrate “ if he employs the force, treasure and officers of the society to corrupt the representatives or openly to pre-engage the electors and prescribe what manner of persons shall be chosen. For thus to regulate candidates and electors and new model the ways of election, what is it but to cut up the Government by the roots and poison the very fountain of public security,” and “ For the people having reserved to themselves the choice of their representatives, as the fence to their properties, could do it for no other end but that they might always be freely chosen, and so chosen freely act and

advise, as the necessity of the commonwealth and the public good should upon examination and mature debate be judged to require " These principles, frequently evaded and attacked, had never been overthrown, and in His Lordship's opinion formed part of the very body of our public law The conditions imposed by Rule XIII " are all fundamentally illegal, because they are in violation of that sound policy which is essential to the work of representative government

" Parliament is summoned by the Sovereign to advise His Majesty freely By the nature of the case it is implied that coercion, constraint or a money payment, which is the price of voting at the bidding of others, destroys or imperils that function of freedom of advice which is fundamental in the very constitution of Parliament *Inter alia* the Labour Party pledge is such a price, with its accompaniments of unconstitutional and illegal constraint or temptation

" Further, the pledge is an unconstitutional and unwarrantable interference with the rights of constituencies Still further in regard to the Member of Parliament himself he too is to be free, he is not to be the paid mandatory of any man or organisation of men, nor is he entitled to bind himself to subordinate his opinions on public questions to others, for wages or at the peril of pecuniary loss, and any contract of this character would not be recognised by a Court of law, either for its enforcement or in respect of its breach " His Lordship accepted the judgments of *Fletcher Moulton*, L J , and *Farwell*, L J , in the Court of Appeal on this point

Upon the first question all the Lords were agreed, in the words of Lord *Macnaghten*, that " there is nothing in any of the Trade Union Acts from which it can be reasonably inferred that trade unions as defined by Parliament, were ever meant to have the power of collecting and administering funds for political purposes " And all agreed that a rule which purports to confer on any trade union registered under the Acts of 1871 and 1876 a power to levy contributions from members for the purpose of securing parliamentary

representation, whether it be an original rule of the union or a rule subsequently introduced by amendment, is *ultra vires* and illegal

The judgment of the Court of Appeal was affirmed

Note—It was held in *Wilson v Scottish Typographical Association*, [1912] S C 534, that the above decision applies equally whether the trade union is or is not registered under the Trade Union Acts

Yacher & Sons, Ltd v London Society of Compositors

[1913] A C 107, 82 L J K B 282

Case.] The appellants were general and parliamentary printers and the respondents were a registered trade union. The appellants sued the respondents for conspiracy to libel and for libel to the effect that the appellants had been guilty of unfair dealings in their business, that they were in the habit of treating their employees harshly, that they never employed trade union compositors, and that they were not fit and proper persons to be entrusted with the execution of orders for printing. This libel was communicated to various customers of the appellants. The Master made an order that the respondents' names be struck out of the writ upon the ground that under section 4, sub-section 1 of the Trade Disputes Act, 1906, the action was not competent as against them. *Channell, J*, reversed this order, but the Court of Appeal (*Farwell, L J*, dissenting) rescinded his order and restored the order of the Master.

Judgment—In his judgment Lord *Haldane, L C*, said that in *Taff Vale Ry Co v Amalgamated Society of Railway Servants*, [1901] A C 426, 70 L J K B 905, it had been decided that a trade union registered under the Trade Union Acts could be sued in its registered name, and also that a trade union, whether registered or not, could, since the Judicature Acts, be sued in a representative action at common

Now if the persons selected as defendants were persons who, from their position, might fairly be taken to represent the union. It was pointed out by Lord *Lindley* that if a judgment so obtained was for the payment of damages, it could be enforced only against the property of the union, and that to reach such property it might be necessary to make the trustees parties. This decision gave rise to keen controversy. On the one hand it was contended that the principle laid down ought to remain undisturbed, because it simply imposed on trade unions the legal liability for their actions which ought to accompany the immense powers which the Trade Union Acts had set them free to exercise. On the other hand it was maintained that to impose such liability was to subject their funds, which were held for benevolent purposes as well as for those of industrial battle, to undue risks. It was said that by reason of the nature of their organisation and their responsibility in law for the actions of a multitude of individuals who would be held in law to be their agents, but over whom it was not possible for them to exercise adequate control, they were by the decision of this House exposed to perils which must cripple their usefulness."

The question was "whether a trade union, if it has committed a tortious act, such as a libel, can be sued for damages at all, even if the act is not committed in contemplation or in furtherance of a trade dispute. Before the Trade Disputes Act was passed it undoubtedly could have been so sued, and the question is whether Parliament has put an end to this liability. The Act is confined to trade unions within the definition of the Trade Union Acts of 1871 and 1876. The title is 'An Act to provide for the Regulation of Trade Unions and Trade Disputes'. This appears to me to indicate that the scope of the statute was not confined to the regulation of trade disputes merely. Section 1 is confined to cases of trade disputes and amends the law of conspiracy in such cases by precluding legal remedy unless the act done would have been actionable apart from the circumstances of agreement

or combination to do it. Section 2 is also confined to trade disputes. It legalises what is popularly called 'peaceful picketing'. Section 3 takes away the actionable character of any act done by a person in contemplation or furtherance of a trade dispute if the ground of the action is only that what was done induced another person to break a contract of employment or was an interference with the trade, business or employment of another person or with his right to dispose of his capital or his labour as he pleases. It will be observed that these three sections all relate to trade disputes, but none of them relates exclusively to the case of a trade union.

Section 4, sub-section 1 does, however, relate exclusively to a trade union. It enacts that an action against such a union, whether of workmen or masters, or against any member or officials of the union on behalf of themselves and all the other members, in respect of any tortious act alleged to have been committed by or on behalf of the union, shall not be entertained by any Court. This section differs from the three preceding sections not only in relating exclusively to the case of a trade union, but in that sub-section 1 omits mention of any restriction which would confine the tortious act to one in contemplation or in furtherance of a trade dispute."

By sub-section 2 "Nothing in this section shall affect the liability of the trustees of a trade union to be sued in the events provided for by the Trade Union Act, 1871, s. 9, except in respect of any act committed by or on behalf of the union in contemplation or furtherance of a trade dispute." It was contended that this ought to be read as a proviso to sub-section 1 restricting its operation. "Having regard to the distinction," said Lord *Haldane*, "drawn in the wording of the statute between the liability of the trade union and the liability of its trustees, I see no justification for importing the provision restricting liability enacted in the latter sub-section into the words of sub-section 1."

Lords *Macnaghten*, *Atkinson*, *Shaw* and *Moulton* agreed with Lord *Haldane* that section 4, sub-section 1 is general in

its application and is not limited to tortious acts committed
^u in contemplation or furtherance of a trade dispute
^u Decision of the Court of Appeal affirmed and appeal
ⁿ dismissed with costs
^b

Ware and De Freville v Motor Trade Association and others.

[1921] 3 K B 40

[Case] The defendant association was a trade union certified as such under section 2, sub-section 3 of the Trade Union Act, 1913, and the other defendants were the chairman and members of the council of the association, which consisted of manufacturers of motor vehicles and motor goods with the object of fixing prices. The plaintiffs were dealers in motor-cars and were not members of the association. On behalf of a customer they had advertised for sale a new motor-car, which was being manufactured by a member of the association at a price exceeding that fixed by the manufacturers. The council therefore placed the plaintiffs' name on a stop list, which was published in the trade journals. In the action the plaintiffs claimed "an injunction restraining the defendants, their servants or agents and each of them from publishing the name of the plaintiff company in a stop list or black list or from publishing any libel of the plaintiffs injuriously affecting them in their business in motor-cars or from publishing any statement calculated to prevent any person, firm or company to break their contracts with the plaintiffs."

Held —(1) That in the absence of evidence that the words complained of would be understood in a meaning other than their ordinary meaning, they were not capable of a defamatory meaning, (2) that the publication of the plaintiffs' name in the stop list was done by the defendants *bona fide* in the protection of trade interests of the members of the association and therefore was not unlawful and an injunction should not

be granted *Hodges v Webb*, [1920] 2 Ch 70, 89 L J Ch 273, was approved

Note—*Scrutton* and *Atkin*, LJJ, expressed the opinion that the words “action in respect of any tortious act alleged to have been committed” in section 4 of the Trade Disputes Act, 1906, applied to an action for an injunction to restrain the future commission of a tortious act. The words “in respect of” seemed framed with intentional width to cover all remedies asked for in relation to a tortious act, whether committed or about to be committed. “I cannot think,” said *Scrutton*, LJ, “that Parliament intended to allow injunctions to be granted in respect of acts for which when done no damages could be claimed, and therefore, though I feel I am straining the language of the Act, I must read “alleged to have been committed” as including allegations that trade unions are about to commit tortious acts.”

By section 4 of the Trade Unions and Trade Disputes Bill, 1927, any contribution to the political fund of a trade union may be levied upon a member unless he has consented thereto by notice in writing in the form set out in the First Schedule, and all contributions to the political fund must be levied and made separately from the contributions to the other funds, and no assets of the trade union other than the amount raised by such a separate levy may be carried to that fund, and no assets other than those forming part of the political fund may be directly or indirectly applied or charged in furtherance of any political object to which section 3 of the Trade Union Act, 1913, applies, and any other charge in contravention of this sub-section is void.

INTIMIDATION

Sloan v Macmillan

[1922] S C 1 (Ct J 1)

Case] During a coal strike some seventeen persons acting together to carry out a resolution of a miners' union proceeded at night to a colliery in order to stop pumping work which was being carried on by volunteers. On arrival, five of the party, including the leader, entered the premises, the rest waiting outside. The leader falsely stated to the volunteers and to the police on duty that the pit was surrounded by hundreds of desperate men whom he had difficulty in controlling, and he ordered the fires to be drawn and the work stopped. The volunteers were overawed and agreed to stop work, and drew one of the fires, but refused to draw the others, whereupon the leader ordered in others of his party to draw the fires, which they did, the rest of the party waiting outside in order to make sure that the volunteers carried out their agreement to cease work.

The leader and two of the party who had entered the premises and had taken an active part were tried and convicted by the Sheriff upon a charge of forming part of a riotous mob which, acting for a common purpose, had unlawfully compelled the volunteers to cease work.

Judgment — Upon appeal to the High Court of Justiciary it was held that the facts warranted the conviction. "It was," said the Lord Justice Clerk, "found as a fact that seventeen persons went to this pit for the purpose of ordering the fires to be drawn so that the workings should be drowned out, and of enforcing their orders. That was obviously an illegal purpose, and the suggestion that Alexander Sloan and his associates did no more than use peaceful persuasion to

the voluntary workers is simply nonsense Sloan went there with several of his associates, and, for the purpose of intimidating the workers there, persistently lied—as he now represents the argument to us—to the police and to some of the voluntary workers by stating that he was backed up by hundreds of desperate men In point of fact he did intimidate the workers there, and the fear which Sloan and his associates engendered was a perfectly justifiable fear that if the voluntary workers did not do what they were asked to do, bodily harm would happen to them By what is now said on his behalf to be his lying representations Sloan succeeded in getting the men at the pithead to cease stoking the fires and to raise the men in the pit to the pithead I think it is impossible to hold that there was anything of the nature of peaceful picketing on this occasion, and, if it is the belief that this was peaceful picketing, the sooner that belief is dispelled the better It was not peaceful picketing, it was riotous conduct which is liable to punishment ”

Note —Section 3 of the Trade Unions and Trades Disputes Bill, 1927, which deals with intimidation, is printed on p 350

RIGHT TO STRIKE

National Sailors' and Firemen's Union of Great Britain and
Ireland *v* Reed

[1926] 1 *Ch* 586, 95 *L J Ch* 192

Case.] The facts appear in the judgment, which in view of the importance of this question is here reproduced in full

Judgment —“ This is a motion,” said *Astbury, J* , “ in an action brought by the National Sailors' and Firemen's Union of Great Britain and Ireland against a number of defendants who are officers or officials of a branch in London of the plaintiff union, seeking an injunction to restrain the defendants as branch secretaries or officials of the union or in the name of the union, calling members of the plaintiff union to leave their employment without the authority of the executive council of the union. The defendants have appeared in person and they have given me considerable assistance in dealing with this matter, which I am bound now to do. I will try and state as clearly as I can the facts which have been proved in the evidence and which have been filed upon this motion

“ The facts are as follows. First, a serious crisis has arisen in the country with regard to the dispute in the mining industry. The General Council of the Trades Union Congress have assumed control of this dispute and have called upon all affiliated unions to the Trades Union Congress to cease work if required by the General Council. The General Council has called a so-called general strike, and the defendants have kindly explained to me the nature of that strike which has been so called. A large number of unionists throughout the country in railway, transport, and other trades have been called upon by the Trades Union Council to

come out on strike. The defendants are the branch secretary and delegates of the Tower Hill branch of the plaintiff union, and they intend to take instructions from the Trades Union Congress and not from the executive council of their own union in relation to the matter in question. The Tower Hill branch of the plaintiff union has, without the authority of that union, passed a resolution indorsing the action of the Trades Union Congress in calling a general strike, and that resolution is in these terms: 'We, the members of the Tower Hill Branch of the National Sailors' and Firemen's Union, indorse the action of the Trades Union Congress General Council in calling the general strike, and pledge ourselves to do all in our power to help them, and we call on the branch secretary and officials to notify all members to cease work immediately.' In pursuance of the above resolution, the defendant Stuart has issued the following notice. It is written on the plaintiff union's paper, it is addressed from 27, Plough Road, Rotherhithe, and dated May 4. It is in these terms: 'All members of the Sailors' and Firemen's Union, except men on articles of agreement, are to come out in support of the Trade Union Council's policy, and are to picket their jobs.' Mr Stuart signs that as acting secretary, and he has explained to me in Court what it means, and the other defendants are apparently in agreement with him. I have been told that that policy therein referred to is the policy of the Trades Union Congress in trying to induce and promote a general strike throughout the country. In addition to the resolution of the Tower Hill branch, which I have already read, they passed a further one as follows: 'We, the members of the Tower Hill branch, express our confidence in the secretary and officials of this branch'—whom I have had the pleasure of seeing and hearing—'and we will support them in carrying out the instructions of the Trades Union Congress General Council.' I have been informed by the defendants that those instructions are, to come out on strike. The general president of the plaintiff union, Mr Havelock Wilson, has

made an affidavit in which he has proved a number of the matters I have referred to, and in paragraph 3 he says this "Having regard to the present emergency the attitude of the above-named defendants is one of national importance, inasmuch as beyond it causing a breach of agreements with the shipowners it is an interference with the food supply on which the nation is dependent' According to the rules of the plaintiff union certain trade union benefits are given to the members of the union under certain conditions One of these conditions is that without the consent of a two-thirds majority assured no general strike—that means no strike in the union itself—shall be proclaimed, and in rule 16, sub-rule 3, there is a provision referring to members 'wilfully and persistently doing or suffering any act or thing in contravention of any of these rules or of any lawful resolution of the Executive Council' According to the evidence before me certain members of the plaintiff union have been misled and compelled in London by the defendants and their pickets to leave their ships and to suffer serious loss and damage, and have been placed in doubt as to their position as members of the union These acts on the part of the defendants have been done without the authority of the plaintiff union, and contrary to its rules and orders, and no ballot of its members, as provided for by its rules, has been completed In these circumstances the plaintiff union seeks the injunction which I have referred to, and the learned counsel who has appeared for the union bases his right to claim this injunction on two grounds one, that the defendants have acted in breach of the rules and orders of the union, and are liable to be restrained, as proved, and, secondly, that they have acted contrary to the common law of this country

"I will endeavour now to state what I apprehend is the law upon this matter To take the more general ground first, it is evident from the facts above mentioned, and from the rest of the evidence that has been filed, that members of the plaintiff union have been placed in a position of doubt and

danger, and it is my duty, as I have been requested by the plaintiffs and defendants to do, to state shortly their rights and those of their union. The so-called general strike called by the Trades Union Congress Council is illegal, and persons inciting or taking part in it are not protected by the Trades Disputes Act, 1906. No trade dispute has been alleged or shown to exist in any of the unions affected, except in the miners' case, and no trade dispute does or can exist between the Trades Union Congress on the one hand and the Government and the nation on the other. The orders of the Trades Union Congress above referred to are therefore unlawful, and the defendants are acting illegally in obeying them, and accordingly (for the reason I shall state under the other head) can be restrained by their own union from doing so. The plaintiffs' counsel has contended that if the members of the plaintiff union stay in their jobs and refuse to strike they cannot be deprived of their trade union benefits, and the defendants who have appeared before me have stated, and stated very properly, that it is important to them that their members should know their rights in this respect.

"Now the law upon that matter is as follows. No member of the plaintiff union or any other trade unionist in this country can lose his trade union benefits by refusing to obey unlawful orders, and the orders of the Trades Union Congress and the unions who are acting in obedience thereto in bringing about the so-called general strike are unlawful orders, and the plaintiff union is entitled to have this fact made clear and brought to the attention of its members. ad.

"Mr. Luxmore has further contended that those members of the plaintiff union who obey this order to strike will not be entitled during the continuance of the strike to receive any strike pay from their union, and the defendants have, again, very properly, and I think very fairly, stated that it is their desire that they should know, and that their members should know, their rights in this respect. Trade union funds in this country are held in a fiduciary capacity, and cannot legally be

used for, or depleted by, paying strike pay to any member who illegally ceases to work and breaks his contract without justification in pursuance of orders which are unlawful, and this fact also is one that the plaintiff union is entitled and bound to make clear to its members in the difficult position in which they have been placed

"With regard to the other ground upon which the plaintiff seeks to obtain this injunction the matter is beyond question. The defendants, in addition to acting, as above said, in defiance of the law, have acted contrary to the rules and orders of their own union, and are on this ground also liable at the suit of that union to be restrained by injunction from continuing to do so

"The result is that there must be an injunction until the trial or further order substantially in the terms of the notice of motion, which can be settled later, or the defendants may, if they prefer it, give an undertaking in those terms. I was desirous during the hearing of assisting the defendants, as far as I was able to do so, in coming to a conclusion whether they would prefer to give this undertaking or be restrained by injunction. They agreed that they would like to know their rights before deciding which course to adopt. I have done my best to explain those rights as I understand them. I will now ask the defendants to agree among themselves whether they prefer that the injunction should be granted *in invitum* or to give an undertaking substantially in the same terms."

The defendants, after discussion, decided that they would prefer that the injunction should be granted

Note—In his speech in the House of Commons, on May 11, 1926, Sir John Simon defined what he understood to be the character of the general strike then taking place. "The plain fact is," he said, "—not as a matter of narrow law, but as a matter of broad fundamental constitutional principle—that once you get the proclamation of a general strike such as this is, it is not, properly understood, a strike at all, because a strike is a strike against employers to compel them to do something, but a general strike is a strike against the

general public to make the public, Parliament and the Government do something "

After citing passages from *Astbury, J's* judgment declaring the so-called general strike illegal and contrary to law, Sir John Simon quoted the following observations by Sir Henry Slessor in his book "Industrial Law," published in 1924 "There has recently arisen for consideration the question how far a strike called for political objects—'direct action' as journalists have called it—that ~~is~~ a strike to interfere with or constrain the acts of the Government in conduct which the trade unions do not approve, can be said to be a strike in contemplation or furtherance of a trade dispute This matter has fortunately not yet had to be decided I have very little doubt that such a strike would not be covered by the words in the definition of the Trade Disputes Act "

It has been suggested by Judge *Athcley Jones, K C*, in the "East Anglian Daily News," July, 1926, and by Sir Henry Slessor in the debate on the Address on February 14, 1927, that the Chartist case of *R v Cooper and others*, 4 St Tr (ns) 1250, is in favour of the legality of a general strike, at least if carried on without incitement to violence

In August, 1842, a widespread strike, accompanied with rioting and great destruction of property, took place in the Potteries Cooper and others addressed public meetings in violent language, and urged the strikers to remain out until the Charter became law They were indicted for seditious conspiracy, and found guilty

In his charge to the jury *Eisline, J*, said that "as it was not unlawful for men to agree to desist from working for the purpose of obtaining an advance of wages, neither was it unlawful for them to agree among themselves to support each other for the purpose of obtaining any other lawful object, and then if the establishment of the Charter were a lawful object, and the means proposed for effecting that object were lawful, he could not see that the adoption of such means by the men was criminal, and therefore he could not see how it could be criminal in others honestly and peaceably to advise and encourage their adoption But if the obvious peril of such an experiment was such as to convince the jury that the defendants contemplated, and intended, through the pressure of distress from a simultaneous cessation of all work, to produce discontent, tumult and outrage, and through the operation of such results to press on the Government the adoption of the Charter, then the charge of this indictment would be made out "

Upon the defendants coming up for judgment in the Court of

Queen's Bench before Lord *Denman*, L C J , *Patteson*, *Coleridge* and *Littledale*, JJ , the Court, however, interpreted the law more narrowly than *Erskine*, J "The Court does not say it is lawful for any men to combine not to do any work at all, and it is clearly illegal for persons to compel other workmen throughout the whole country to abstain from work until the Charter becomes the law of the land This is an act which has been characterised as an overt act of treason, at all events it is unlawful "

Of the six points of the Charter, four are now the law of the land by the action of the Legislature The people have consequently less reason than they had in 1842 for resorting to unconstitutional methods of enforcing their will upon Parliament *Cooper's Case* decided that it was illegal to compel men throughout the country to abstain from work until the Charter became the law of the land There was, in fact, compulsion in the general strike of 1926 *Cooper's Case* would not therefore appear to support its alleged legality

This controversy will be concluded when the Trade Unions and Trade Disputes Bill, 1927, receives the Royal Assent The relevant sections are printed on p 350

NOTE IX — OFFENCES AGAINST THE STATE

High Treason —According to Sir Edward Coke the Treason Act, 1351 (25 Edw 3, st 5, c 2), was said to be for the most part declaratory of the common law

Treason was not at first regarded as forming a distinct offence of itself. It was merely an act of treachery, and regarded as one of the felonies. Felony is not easy to define. Perhaps Coke was right in deriving it from "fell," meaning gall. A felon was one full of bitterness or venom. In France and elsewhere is covered only those specifically feudal offences which were breaches of the feudal nexus, and which would work a forfeiture or escheat of the fief or lordship, for the lord as well as the man might be guilty of felony. Such a breach of the tie of vassalage was regarded as the most heinous of offences. It was a heinous crime. Thus it came to mean all offences punishable by death, all offences not so punishable being misdemeanours. Every treason was a felony. Other felonies were wounds drawing blood, homicide with malice aforethought, secret murder, suicide, rape, arson, burglary, robbery and larceny. Eventually crimes were classified as (1) treason—high and petty, (2) felonies, (3) misdemeanours. High treason became marked off from all other crimes, inasmuch as the punishment was the most severe, there was no benefit of clergy, the traitor's land was forfeited to the King.

The following is the text of the statute —

"Auxint pur ceo qe diverses opinions cunt este einz ces heures qe cas quant il avient doit estre dit treson et en quel cas noun, le Roi a la requeste des seignurs et de la communalte ad fait declarissement qe ensuit cest assavoir, Quant homme face compasser ou imaginer la mort nostre seigneur le Roi, madame sa compaignie, ou de lour fitz primer et heir, ou si homme violast la compaignie le Roi, ou leisesce fill le Roi nient marie, ou la compaignie leisesne fitz et heir du Roi. Et si homme leve de guerre contre nostre dit seigneur le Roi en son roialme, ou soit aherdant as enemys nostre seigneur le Roi en le roialme, donant a eux aid ou confort en son roialme ou par ailleurs, et de ceo provablement soit atteint de overt faite par gentz de lour condition. Et si homme contreface le grant seal le Roi ou sa monnoie, et si homme apport faus monnoie en ceste roialme, contrefaite a la monnoie d'Engleterre, sicome la monnoie appelle Lusseburgh ou autre semblable a la dite monnoie d'Engleterre, sachant la monnoie estre faus,

pui marchander ou paiement faire, en deceit nostre dit seigneur le Roi et son peuple Et si homme tuast chancelloz tresorier ou justice nostre seigneur le Roi, del un baunk ou del autre, justice en eir des assise et toutes autres justices assignez a oier et terminer, esteiantz en leurs places en fesantz leurs offices, Et fait a 'entendre qen les cafes suisnommez doit estre ajugge treson q'cestent a nostre seigneur le Roi et a sa roial majeste Et de tieles maneres de treson la forfaiture des eschetes appartient a nostre seigneur le Roi, si bien des terres et tenemenz tenuz des autres come de lui mesmes

" Et ovesqu ceo il y ad autre manere de treson cest assavoir quant un servant tue son mistre, une femme qe tue son baron, quant homme seculer ou de religion tue son prelat a q1 doit foi et obedience et tiele manere de treson donn forfaiture des eschetes a chescun seigneur de son fee propre

" Et pur ceo qe plusurs autres cases de semblable treson purient escheer en temps a venir, queux homme ne purra penser ne declarer en present, assentu est qe si autre cas supposee treson, qe nest especifie paramount aviegne de novel devant ascunes justices, demoerge la justice saunz aler ajuggement de treson, tanqe pai devant nostre seigneur le Roi et son parlement soit le cas monstree, et desclarre, le quel ceo doit estre ajugge treson, ou autre felonie

" Et si par cas ascun homme de cest roialme chivache arme, descovert ou secrement, od gentz aimees contre ascun autre, pur lui tuer ou derober, ou pur lui prendie et ietenir tanqil face fyn ou raunceon pur sa deliveiance avoir, nest pas lentent du Roi et de son conseil qe en tel cas soit ajugge treson, einz soit ajugge felonie ou trespas, folonc la lei de la terre auncienement usee, et solonc ceo qe le cas demand Et si, en tieu cas ou autre semblable devant ces heures, ascune justice eir ajugge treson et par celle cause les terres et tenemenz soient devenus en la main nostre seigneur le Roi come forfaitz eient les chiefs seignurs de fee lous eschetes des tenementz de eux tenuz, le quel qe les tenemenz soient en la main nostre seigneur le Roi ou en la main des autres, pai donn ou en autre manere

" Sauvaut totefortz a nostre Seigneur le Roi lan et le wast, et autres forfaitures des chateux qe a lui attenent, en les cases suisnommez et qe brieves de Scire facias vers les terres tenantz soient grantez et tieu cas, saunz autre originale et saunz allower la protection nostre seigneur le Roi en la dite seute, et qe de les terres qe sont en la main le Roi soit grante brief as viscontes des countees la ou les terres serient de ostier la main le Roi saunz autre delais "

By 21 Ric 2, c 3 (1397), everyone was guilty of treason " which compasseth or purposeth the death of the King or to depose him or to

render up his homage or liege or he that raised people and ride against the King to make war within his realm" Nothing is said of any overt act The trial was to be in Parliament The statute was repealed by 1 Hen 4, c 10 (1399)

By 2 Hen 5, c 6 (1414), it was made treason to kill, rob or spoil persons possessing the King's safe-conduct This statute was repealed by 20 Hen 6, c 11 (1442)

By 11 Hen 7, c 1 (1494), obedience to a king *de facto*, but not *de jure*, was not to expose his adherents to a charge of treason if the rightful king returned to the throne

Of the nine Acts of Henry VIII creating new treasons, four related to the struggle with the Pope and five to the succession to the Crown The former were 26 Hen 8, c 13 (1534), 28 Hen 8, c 10 (1536), 31 Hen 8, c 8 (1539), and 35 Hen 8, c 3 (1543) The latter were 25 Hen 8, c 22 (1534), 28 Hen 8, c 7 (1536), 32 Hen 8, c 25 (1540), 33 Hen 8, c 21 (1542), and 35 Hen 8, c 1 (1543)

All these were repealed by 1 Edw 6, c 12 (1547), which enacted that nothing should be treason except the offences against 25 Edw 3, and the offences created by the new statute, viz (1) Affirming by words that the King is not the supreme head of the Church, or that any other is, or that he is not King, or compass to depose him, (2) affirming by writing, printing, overt deed or act, that he is not the supreme head of the Church, or that any other is, or compass to depose him, (3) misprision of treason

By 1 Mary, st 1, c 1 (1553), nothing was to be treason, petty treason or misprision of treason except as declared and expressed by 25 Edw 3, all other subsequent Acts to the contrary notwithstanding

By 3 & 4 Edw 6, c 5, it had been made high treason for twelve or more persons to attempt to kill or imprison any of the King's Council, or to alter any laws, and to continue together by the space of an hour after an order to disperse These offences became by the above statute of Mary felonies with benefit of clergy

Other new treasons were created by 1 & 2 Phil and Mary, c 9 and c 10 (1554), 1 Eliz c 5 (1558), 13 Eliz c 1 (1570), 23 Eliz c 1 (1581), 27 Eliz c 2 (1585), 1 Jac 1, c 4 (1603), 13 Car 2, c 1 (1661), 9 Will 3, c 1 (1697), and 12 & 13 Will 3, c 3 (1701)

Constructive Treason — Obviously the statute of Edward III is incomplete It only protects the personal security of the King He is not to be killed nor is any step to be taken towards his death War is not to be levied against him, but no provision at all is made for any acts of violence towards the King's person which do not display an intention of taking his life Nothing is said of attempts to imprison

or depose him, or to interfere with the exercise of his undoubted prerogatives, or about disturbances, however violent, which do not reach the point of an actual levying of war, nor even of a conspiracy or attempt to levy war

It was under Elizabeth that the doctrine of constructive treason received its fullest development. It is best described by Foster in his "Discourse on High Treason." On compassing the death of the King he writes: "The care which the law hath taken for the personal safety of the King is not confined to actions or attempts of the more flagitious kind, to assassination or poison, or to other attempts directly and immediately aiming at his life. It is extended to everything wilfully and deliberately done or attempted whereby his life may be endangered, and therefore the entering into measures for deposing or imprisoning him, or to get his person into the power of the conspirators—these are overt acts of treason within this branch of the statute, for experience hath shown that between the prisons and the graves of princes the distance is small."

"Offences which are not so personal have been brought within the same rule, as having a tendency, though not so immediate, to the same fatal end, and therefore the entering into measures in concert with foreigners and others in order to an invasion of the kingdom, or going into a foreign territory, or even purposing to go thither to that end, and taking any steps in order thereto—these offences are overt acts of compassing the King's death."

"Levying war is an overt act of compassing, and under the limitation to be stated, conspiring to levy war likewise is an overt act within this branch, and so is a treasonable correspondence with the enemy, though it falleth more naturally within the clause of adhering to the King's enemies."

"The offence of inciting foreigners to invade the kingdom is a treason of signal enormity. In the lowest estimate of things, and in all possible events, it is an attempt on the part of the offender to render his country the seat of blood and desolation, and yet unless the Powers so incited happen to be actually at war with us at the time of such incitement, the offence will not fall within any branch of the statute of treasons, except that of compassing the King's death, and therefore since it hath a manifest tendency to endanger the person of the King, it hath in strict conformity to the statute, and to every principle of substantial justice, been brought within that species of compassing the King's death—*ne quid detrimenti respublica capiat*."

In support he cites *Lord Preston's Case* and *Harding's Case*. See also *Essex's Case* (1600), 24 St Tr 1353.

As to constructive levying of war, Foster says the true criterion is the intention. If it were some private quarrel, or against some particular person, it would not be treason.

"Every insurrection which in judgment of law is intended against the person of the King, be it to dethrone or imprison him, or to oblige him to alter his measures of government, or to remove evil counsellors from about him—these risings all amount to levying war within the statute, whether attended with the pomp and circumstances of open war or not, and every conspiracy to levy war for these purposes, though not within the clause of levying war, is yet an overt act within the clause of compassing the King's death. For these purposes cannot be effected by numbers and open forces without manifest danger to his person."

"Insurrections to throw down all enclosures, to alter the established law, or change religion, or to enhance the price of all labour, or to open all prisons—all risings in order to effect these innovations of a public and general concern—are in construction of law high treason within the clause levying war, for though they are not levelled at the person of the King, they are against his royal Majesty, and, besides, they have a direct tendency to dissolve all the bonds of society and to destroy all property and all government, too, by numbers and an armed force. Insurrections likewise for redressing national grievances or for the expulsion of foreigners in general, or, indeed, of any single nation living here under the protection of the King, or for the reformation of real or imaginary evils of a public nature, and in which the insurgents have no special interest, are, by construction of law, within the clause of levying war, 'for they are levelled at the King's crown and royal dignity'."

"But a bare conspiracy for effecting a rising for the above purposes is not an overt act of compassing the King's death, nor will it come under any species of treason within the 25 Edw. 3, unless the rising be effected."

In support he cites the cases of *Dammaree* and *Purchase*, *supra*.

For constructive adhering he cites the cases of *Hensey* and *Vaughan*. The bare sending of money, provisions, or intelligence to the enemy, which is generally the most effectual aid possible, is treasonable, although these be intercepted, the party in sending did all he could, the treason was complete on his part, though it had not the effect he intended.

The construction placed upon the clause of adhering by the Judges in *R v Casement* is at least open to question. They preferred to follow the construction of *Coke*, *Hale*, and *Hawkins*.

They admitted that the clause was ambiguous, but refused to consider the intention of the Legislature, and to deal with the clause as one of first impression, in view of the weight of existing authority. In *R v Most*, *supra*, where the defendant sought to explain the meaning of section 4 of 24 & 25 Vict c 100, by reference to two Irish statutes upon which it was based, Lord Coleridge, C J, said "We have not to do with the history of the words, unless the words in the statute are doubtful and require historical investigation. If the words are really and fairly doubtful, according to well-known legal principles and principles of common sense, historical investigation may be used for the purpose of clearing away the doubt which the phraseology of the statute creates."

In commenting on the word "adherent," after correctly citing the clause, *Coke* glosses the statute thus "This is here explained, viz, in giving aide and comfort to the King's enemies within the realme or without delivery or surrender of the King's castles or foits by the King's captaine thereof to the King's enemies within the realme or without for reward" Inst, Part III, p 10

In commenting upon piracy under 28 Hen 8, c 15, *Coke* notes "Treason done out of the realme is declared to be treason by the statute of 25 Edw 3, and yet at the making of this Act of 28 Hen 8 it wanted triall at the common law" Inst, Part III, p 113

The cases cited by *Coke* in support were tried in the High Court of Parliament or in the Court of the Constable and Marshall as military offences. In the case cited by Hawkins from Dyer, 131, the Judges declared their opinion to be that "no offence of treason committed out of the realm was triable here by the course of the common law," but only by 35 Hen 8. Speaking of the trial of foreign treason, viz, "adhering to the King's enemies, as also for compassing the King's death without the kingdom at this day, the statute of 35 Hen 8, c 2," says Hale, "has sufficiently provided," citing *Story's Case* in Dyer, 298, 300. Story, however, adhered not to the King's enemy, but to a traitor, and so was not within the statute at all. "But at common law," adds Hale, "he might have been indicted in any county of England, and especially where the offender's lands lie, if he have any." As authority for this proposition he refers to the following *dictum* from a case in 1382—"Si home soit adherent as enemys le roi en Fraunce sa terre est forfeitable, sa adherans serra treis lou sa terre est come ad este souvent foitz fait des adherantz as enemies le Roy en escoce"¹ But what if he had no land? For this Hale gives

¹ Fitzherbert Abr Trial 54, 5 Rac 2

no authority. And what is the authority for the *dictum* of 1382? So far none has been produced. In his judgment in *O'Connell's Case*, *supra*, Lord Denman asked what was the duty of a Court of error when doubt was cast upon a proposition generally approved by the profession. His answer was, "To consider whether the doubt is well founded or not. Not to be run away with by mere authority, unless, indeed, it is so decisive as to get rid of the doubt, but to see whether in point of law there is legal ground for the doubt." He referred to *Hutton v Balme*, 2 Y & J 101, 2 Cl & J 19, in the Court of Exchequer, when "it was proposed to overrule, not the *dicta*, the impressions, the fancies of the frequenters of Westminster Hall, but decided cases running through a period of near fifty years, appearing in numerous reports, and laid down by all text writers." These were traced to a *dictum* of Lord Mansfield, which was held to be untenable, and the Court unanimously denied their authority and overruled them all.

It is impossible that the words "or elsewhere" should govern the words "or be adherent to the King's enemies in his realm" without also governing "compassing the King's death, and levying war against the King in his realm." And for these there are no authorities. There are no words of limitation to compassing, and Hale himself says "it must be a levying of war against the King *in his realm*," 1 P C 130. The construction of these great lawyers, Coke, Hale and Hawkins, made three centuries after the statute, being thus unquestionably open to doubt, it was the duty of a Court of error to resort to historical investigation in order to ascertain if possible the intention of the Legislature.

As Stephen points out, at this moment Edward III was at the zenith of his popularity and power. He required no protection. He only wanted his supplies. But the Commons and the amphibious barons, as Maitland calls them, did seek protection. The petitioners of 1347 prayed that it might be declared in what cases men encroached upon the royal power, and the petitioners of 1351 in what cases acts of violence by one subject upon another were treason. Both these are dealt with in the statute. The amphibious barons were equally concerned for their estates. Already forfeitures of their French and English estates had occurred. If the modern construction is correct the barons were putting a rope round their necks. This is incredible. Their intention was that they were only to be traitors if they assisted the King's enemies in his realm by giving them aid in the realm, or, if the enemies were outside, by sending them aid, *e.g.*, money, arms, provisions, intelligence. If the modern construction is correct, why do

we not find cases of forfeitures between 1351 and 1543? Moreover, the landowners were anxious to restrict the ambit of forfeiture. In cases of felony the offender's lands held of mesne lords returned to the latter after the King's year of possession had expired. In cases of high treason, the offender's lands, of whomsoever held, were forfeited to the King absolutely.

It was said by the Court of Criminal Appeal "that the subjects of the King owe him allegiance, and the allegiance follows the person of the subject. He is the King's liege wherever he may be, and he may violate his allegiance in a foreign country just as well as he may violate it in this country." But if for want of venue he cannot be prosecuted, what then? A man is not guilty of any offence until he has been tried and convicted. Upon this point Lord Buckmaster is quite clear in *Bowman v Secular Society, Ltd*, *supra*, when speaking of offences against Christianity. He said "That so far as they are recognised by law they are either statutory offences leading to statutory penalties, or they are criminal offences at common law, punishable by criminal courts, and I am unable to see how such offences, if not so punishable, exist at all, or how in this connection an act can be illegal without being the subject of prosecution."

It is unfortunate that the Attorney-General in the exercise of his discretion refused, under section 6, sub-section 1, of the Criminal Appeal Act, 1907, his certificate for appeal to the House of Lords on the ground that the decision involved a point of law of exceptional public importance. That Casement could not put off his allegiance during war by going to the enemy country and becoming an agent of the German Government is settled law. Morally he was guilty of the worst form of treason. The only question was, Could he be convicted under the statute of Edward III?

Hale pointed out the dangers of the doctrine of constructive treason. He insists upon the necessity for some fixed and settled boundary, and upon the danger of departing from the letter of the statute of Edward III by multiplying and enhancing crimes into treason by ambiguous and general words, such as "encroaching of royal power," "subverting of fundamental law," and the like. And also how dangerous it is by construction and analogy to make treasons, where the letter of the law has not done so, for "such a method admits of no limits or bounds, but runs as far as the wit and invention of accusers and the odiousness and detestation of persons accused will carry men."

1 P C 86

Nevertheless, in commenting upon the failure of the prosecution to obtain convictions in the cases of Lord George Gordon, Hardy, and

Horne, Tooke, Mr Justice Stephen thought that on the whole, the wide construction put upon the Act of Edward III by Coke, Hale and Foster had never been doubted by any Court called upon to administer the law, though no doubt it had in a popular sense been more or less discredited by the trials of 1794. He did not believe, however, that even popular feeling would regard as too severe a view of the law which makes it high treason to enter into a real conspiracy to excite a rebellion or carry out a forcible revolution, even though the legal result may involve the use of a legal fiction.

The immediate result, however, of this failure was the Act of 1795 (36 Geo 3, c 7), which enacted that it should be treason to "compass, imagine, invent, devise, or intend death, or destruction, or any bodily harm, tending to death or destruction, maim or wounding, imprisonment or restraint, to the person of his Majesty, or to depose him, or to levy war against him, in order by force or constraint to change his measures or counsels, or in order to put any force or constraint upon, or to intimidate or overawe both Houses or either House of Parliament, or to move or stir any foreigner with force to invade this realm or any other of his Majesty's dominions," such compassing, etc, being manifested "either by any printing or writing or by any overt act or deed."

This statute was limited to the life of George III, but was made perpetual in 1817 by 57 Geo 3, c 6.

Treason Felony—Political unrest produced the Treason-Felony Act of 1848 (11 & 12 Vict c 12), which repealed the provisions of 36 Geo 3, c 7, "save such of the same respectively as relate to the compassing, imagining, inventing, devising or intending death or destruction, or any bodily harm tending to death or destruction, maim or wounding, imprisonment or restraint of the person of the heirs and successors of his said Majesty King George III." By section 2 these offences were extended to Ireland. By section 3 "If any person shall within the United Kingdom or without compass, imagine, invent, devise or intend to deprive or depose," the Queen, etc, "or to levy war against her Majesty, her heirs or successors, within any part of the United Kingdom, in order by force or constraint to compel her or them to change her or their measures or counsels, or in order to put any force or constraint upon or in order to intimidate or overawe both Houses or either House of Parliament, or to move or stir any foreigner or stranger with force to invade the United Kingdom, or any other of her Majesty's dominions, etc, and such compassing, imaginations, inventions, devices or intentions, or any of them, shall express utter or declare by publishing

any printing or writing, or by open and advised speaking, or by any overt act or deed, every person so offending shall be guilty of felony," and be liable to transportation for life, or seven years, or to two years imprisonment with or without hard labour. By section 6 nothing is to affect 25 Edw 3, c 2, and by section 7, in an indictment for felony, if the facts also amount to treason, the indictment remains valid, and if the facts proved amount to treason the defendant shall not be entitled to be acquitted of felony, but he shall not be afterwards prosecuted for treason upon the same facts. The maximum penalty is now penal servitude for life.

Riots and Unlawful Assemblies—Under the common law little distinction was drawn between levying war against the King and riots and unlawful assemblies. It was only a question of degree. It was, however, made clear by the Statute of Treason that killing, robbery, or detention by one subject with men-at-arms of another subject was not treason. By 3 & 4 Edw 6, c 5 (1549), it was made treason for twelve persons or more "to attempt to kill or imprison any of the King's Council or to alter any laws and to continue together by the space of an hour, being commanded by a justice of the peace, mayor, sheriff, etc., to retire." And it was made felony for twelve persons or more to practise to destroy any park, pond, conduit or dove-house, or to have common or way in any ground, or to pull down any houses, barns or mills, or to burn any stack of corn, or to abate the rents of any lands, or the price of any victual and to continue, etc., as above.

These offences were reduced to indictable felony by 1 Mar, sess 2, c 12. In *Messenger's Case* (1668), 6 St Tr 879, some London apprentices were convicted of making a riot for the purpose of pulling down brothels. Ten Judges to one (Sir *Matthew Hale*) held that this was treason. In 1675, however, in the cases of the riots in Middlesex, London, Essex, Kent and Surrey by the weavers, for the destruction of engine-looms, the Judges were equally divided, five holding them high treason and five that this was not levying war against the King within 25 Edw 3, or within 13 Car 2, for conspiring to levy war. It seemed to them doubtful whether this was more than a riot, and accordingly the offenders were prosecuted for that offence only. 1 Hale P C 143. In *Dammaree's Case*, however, the doctrine of constructive treason was pushed to extreme.

The Riot Act of 1714 (1 Geo 1, st 2, c 5) was aimed principally at the Jacobites. It provided that the assembly of twelve or more persons, being unlawfully, riotously and tumultuously assembled together to the disturbance of the public peace, and being commanded

by any justice of the peace, etc., by proclamation in the King's name to disperse, and who remain one hour after such proclamation, were guilty of felony without benefit of clergy, and punishable with death

By 7 Will 4 & 1 Vict c 91, the punishment was reduced to transportation for life, and now by 20 & 21 Vict c 3, to penal servitude or imprisonment

If the Riot Act be not read, it remains a riot at common law in which case it is sufficient, if made by three or more persons, and if any one person is terrified see *R v Fursey*, *supra*

The distinction between a riot and an unlawful assembly is well put in *R v Birt*, *supra*

Sedition—Perhaps the best rendering of *seditio* is "betrayal" Thus Bracton speaks of *seditio personae domini Regis vel regni vel exercitus* Sedition therefore forms the basis of the law of treason and of other felonies But there is a distinct class of seditious offences, such as seditious words, seditious libels and seditious conspiracies These are offences against internal public order, not accompanied by or leading to open violence

Defamation does not appear to have been of much importance in the Middle Ages Bracton, it is true, speaks of defamatory writings amongst minor offences, and there is a provision in the Statute of Westminster the First, 3 Edw 1, c 34 (1275), providing for the imprisonment of the person publishing false news or tales till the author's name is disclosed Coke, however, was only able to find two cases of libel in the records, one in 1337 and the other in 1345 It was not until the development of printing and the rise of the Star Chamber, which coincided, that the law of libel sprang into importance But political libels, if they displayed a treasonable intention, were punished as treason It is doubtful whether the writing was a libel at common law, if not published *Comyns*, CB, and Lord Camden, in *Entick v Carrington*, 19 St Tr, at p 1070, thought it was not The question was argued, but not decided in *R v Burdett*, *supra* In the Star Chamber, however, publication was held not to be necessary Peacham was convicted of seditious libel for an unpublished sermon which had lain in a drawer for twelve years, Hallam, Vol I, p 343 (1615)

Mere words, apart from some statute, do not amount to treason, *Pine's Case*, *supra*, but every one commits a misdemeanour who publishes verbally or otherwise words or documents with a seditious intention The prosecution need not prove that the defendant intended the consequences of his words it is sufficient to show that his words tended to produce the consequences It is for the jury to say whether

his words would or would not in fact tend to produce them. Mere words, however, may be evidence of a treasonable intent, *R v Parkyns* (1696), 13 St Tr 63.

The present law of sedition is the result of a compromise. Those who adopted the Austinian view of the relation existing between the sovereign and the subject argued that no censure should be cast upon the sovereign likely or designed to diminish his authority. Those, on the other hand, who regarded the Government as the agent of the people, argued that every member of the public was entitled to criticise the Government, which was his agent. In this case there could be no such offence as sedition.

Sedition in modern law means words, writings or acts intended or calculated, under the circumstances of the time or place, to disturb the tranquillity of the State, by creating ill-will, discontent, disaffection, hatred or contempt towards the person of the sovereign or towards the Constitution, or Parliament, or the Government, or the established institutions of the country, or exciting ill-will between different classes of the King's subjects, or encouraging any class of them to disobey, defy or subvert the laws of the land, or to resist their execution, or to do any act of violence or outrage, or to endanger the public peace.

By the Seditious Meetings Act, 1817 (57 Geo 3, c 19), public meetings of more than fifty persons within a mile of the Houses of Parliament, for the purpose or on the pretext of considering or preparing any petition for the alteration of matters in State or Church, are to be deemed unlawful assemblies.

In *R v Hunt, supra*, it was held that drilling for the purpose of going to a meeting with ease and regularity was lawful, but if for the purpose of overaweing the Government was high treason, and if for the purpose of securing attention to seditious speeches and of giving confidence to persons disposed to sedition was a misdemeanour.

By the Unlawful Drilling Act, 1820 (60 Geo 3 & 1 Geo 4, c 1, passed in consequence of the meeting in St Peter's Field, unauthorised meetings for the purpose of training or drilling men to the use of arms were prohibited and made punishable with transportation for seven years or two years imprisonment. This is reduced by 20 & 21 Vict c 3, to penal servitude.

The precise moment when organised voluntary associations for the purpose of promoting political changes sprang up cannot be stated. They became popular and influential after the close of the American War of Independence. Upon the outbreak of the French Revolution some of these societies went so far as to provoke prosecutions for high

treason, but with the failure of the prosecution of Redhead (Yorke) for this offence the defendant was indicted upon substantially the same facts for seditious conspiracy. The charge of seditious conspiracy against Hunt and others in connection with the meeting in St Peter's Field, Manchester, failed, whilst the charge of unlawful assembly succeeded. This affair was known as the Peterloo Massacre, and was followed by other and serious consequences.

Two blacksmiths were convicted of selling pike-heads for unlawful purposes, *z e*, that they might be used at a meeting to be held at Bolton to prevent any lawful attempt to disperse the meeting. Knowles is alleged to have said when selling the pike-heads that he hoped the people would meet to avenge "Peterloo." See *R v Knowles* and *R v Morris* (1820), 1 St Tr (N S), pp 498 and 522. Other meetings were subsequently held of a similar character, and several prosecutions took place, the defendants being charged with unlawful assembly and causing persons to go armed to a public meeting. See *R v Dewhurst and others* (1820), 1 St Tr (N S) 529. Several persons were convicted of seditious conspiracy in attending a meeting at Birmingham. See *R v Edmonds and others* (1821), 1 St Tr (N S) 786. Other notable prosecutions were those of Vincent and others in connection with the Chartist movement in 1839, of O'Connell in connection with the agitation for the repeal of the Union, and of Parnell and others in connection with the "No Rent" campaign in Ireland in 1880.

"These prosecutions," says Stephen, "all proceed on principles very similar to those on which seditious libels are tried. The charge commonly is that the defendants conspired together to effect some purpose inconsistent with the peace and good government of the country, and that they manifested that intention by speeches made, meetings held, and other steps taken in concert. The proof commonly is that some form of organisation was formed in which the defendants took part, and that things were written and said in consequence which were calculated to effect the objects in question."

The decision in *O'Connell's Case* shows, says Stephen, "how wide the legal notion of a seditious conspiracy is. It includes every sort of attempt, by violent language either spoken or written, or by a show of force calculated to produce fear, to effect any public object of an evil character."

No precise or complete definition of "evil character" has been given. It will vary with the view of the governing classes, of the nature of the attacks made upon the Government or the constitution. At the present day, says Stephen, writing in 1883, the law of seditious

conspiracy is of greater practical importance than that of seditious libel "Political combinations" are so common, and may become so powerful, that it seems necessary that a serious counterpoise should be provided to the exorbitant influence which in particular circumstances they are capable of exercising "

Blasphemy—In spite of Lord Sumner's subtle reasoning in *Bouman v The Secular Society* it would appear that in the 16th and 17th centuries Christianity was regarded as part of the law of the land to such an extent as to make any attack upon it, quite apart from scurrility, a criminal offence Stephen is probably correct in declaring that the Judges, in holding Christianity part of the law of the land, meant to hold that it was "a crime either to deny the truth of the fundamental doctrines of the Christian religion or to hold them up to ridicule or contempt" Lord Mansfield expressed the modern view of greater toleration when, in *Evans v Chamberlain of London* (1762), 2 Burn's Ecc Law 207, he said "The common law of England knows no prosecution for mere opinions," and Mr Justice Erskine, in *Shore v Wilson* (1842), 9 Cl & Fin 534, when he said "It is, indeed, still blasphemy, punishable at common law, scoffingly or irreverently to ridicule or impugn the doctrines of the Christian faith, yet any man may, without subjecting himself to any penal consequences, soberly and reverently examine and question the truth of those doctrines which have been held essential to it" Lord Coleridge's ruling, therefore, in *R v Ramsey and Foote*, *supra*, was not so novel as has been generally assumed, when he said "If the decencies of controversy are observed, even the fundamentals of religion may be attacked without a person being guilty of blasphemous libel" He was followed by Phillimore, J, in *R v Boulter* (1908), 72 J P 189, who said "A man is free to speak and to teach what he pleases as to religious matters, though not as to morals, but if not for the sake of argument, he were making a scurrilous attack on doctrines which the majority of people hold to be true, in a public place where passers-by may have their ears offended, and where young persons may come, he will render himself liable to the law of blasphemous libel"

Obscenity.—By Lord Campbell's Act (20 & 21 Vict c 83), two justices, or a stipendiary, or metropolitan magistrate, have power to order the seizure and destruction of obscene publications *R v Hicklin*, *supra*, *ex p Bradlaugh* (1878), 3 Q B D 509, 47 L J M C 105 It was said in *R v Barracough*, [1906] 1 K B 201, 75 L J K B 77, that the fact that the defendant sold other books of an indecent character would be evidence of the intention alleged in that case, viz, to corrupt the public morals By the Advertisements Act, 1889

(52 & 53 Vict c 18), persons posting up indecent or obscene advertisements or notices are liable under the Summary Jurisdiction Acts to a fine of 40s or to imprisonment with or without hard labour

Official Secrets—By section 1, sub-section 1, of the Official Secrets Act, 1911 (1 & 2 Geo⁶ 5, c 28), if any person for any purpose prejudicial to the safety or interests of the State (a) approaches, or is in the neighbourhood of, or enters any prohibited place, or (b) makes any sketch, plan, model or note calculated or intended to be directly or indirectly useful to an enemy, or (c) obtains or communicates to any other person any sketch, etc., which is calculated, etc., shall be guilty of felony

By sub-section 2 it is not necessary to show that the accused person was guilty of any particular act tending to show a purpose prejudicial to the safety or interests of the State, and he may be convicted if, from the circumstances of the case or his conduct or his known character as proved, it appears that his purpose was prejudicial

By section 2, sub section 1, any person who wrongfully communicates any sketch, plan, model, article, note, document or information, or retains any sketch, plan, model, article, note or document in his possession or control, shall be guilty of a misdemeanour, and by sub-section 2 any person who receives any sketch, plan, model, article, note, document or information, knowing or having reasonable ground to believe at the time when he receives it that it is communicated contrary to the Act, shall be guilty of a misdemeanour, unless he proves that it was communicated contrary to his desire

By section 10 the Act applies to all acts which are offences under the Act when committed in any part of His Majesty's dominions, or when committed by British officers or subjects elsewhere, and if committed out of the United Kingdom may be tried in any competent British Court in the place where the offence was committed, or in the High Court in England or the Central Criminal Court

The principal Act has been greatly extended and amended by the Official Secrets Act, 1920 (10 & 11 Geo 5, c 75) The provisions relating to punishment and to attempts to commit an offence or to incite are repealed By section 8 felony is punishable with penal servitude of from three to fourteen years, and misdemeanour with imprisonment with or without hard labour up to two years, or under the Summary Jurisdiction Acts with imprisonment with or without hard labour up to three months or to a fine not exceeding £50 or to both By section 1 unauthorised use of uniforms, falsification of reports, forgery, personation, and false dies, seals or stamps, retention of official documents, allowing other persons possession thereof, or com-

municating any secret official code word or pass word, or unlawful manufacture, sale or possession of any such dies, etc., are made misdemeanours. By section 2 communications with foreign agents will be evidence of commission of offences under section 1 of the principal Act. By section 3 interference with officers of the police or of the military forces in the vicinity of prohibited places is an offence. Section 4 gives power to a Secretary of State to require the production of telegrams, whether by wire, cable or wireless. Section 5 requires a person carrying on the business of receiving postal packets, letters or telegrams to register with the police. Section 6 requires every person to give any information in his power to a police officer on demand relating to an offence or suspected offence. Section 7 provides for the punishment of attempts, incitements, etc., to commit offences under the principal Act or this Act. By section 9, after paragraph (a) of sub-section 1 of section 2 of the principal Act the following is inserted —“(aa) Uses information in his possession for the benefit of any foreign power or in any manner prejudicial to the safety or interests of the State”, and after sub-section 1 the following sub-section is inserted —“(1A) If any person having in his possession or control any sketch or information which relates to munitions of war, communicates it directly or indirectly to any foreign power, or in any other manner prejudicial to the safety or interests of the State, shall be guilty of a misdemeanour”. In the First Schedule a number of minor amendments to the principal Act are set forth.

In *R v Blake*, the defendant, formerly governor of one of H M's prisons, after an interval of nearly four years, disclosed, for the sum of £200, for publication in a newspaper, conversations he had held with a convicted murderer on the eve and on the morning of the latter's execution. *Roche, J*, held that the word “information” covered the disclosure of all but trivial acts, that it refers to the disclosure of “something that matters”.

Trade Unions—The series of cases presented here are intended to illustrate the relations of trade unions and their members to the law of the land. It will no doubt be contended that these relations are matters of policy, but it is submitted that the placing of trade unions above the law is a question for the consideration of students of constitutional law.

JUDICIAL CONTROL—PREROGATIVE WRIT OF MANDAMUS

Rex v Dr Askew and others

4 Burrow, 2186 (1765)

Case] In this case a rule had been obtained upon the application of Dr Letch, doctor of physic, calling upon the College of Physicians to show cause why a mandamus should not issue commanding them to admit him to be a member of the college. It appeared that Dr Letch, who practised as a man-midwife, was summoned by the college to be examined. He therefore came in, and was examined thrice at the *comitia minora*, and, after a ballot, declared approved. When, however, this approval was submitted for confirmation by the *comitia majora*, he was declared not elected. He contended that by the approval of the *comitia minora* he had acquired an inchoate right to admission which the Court ought to enforce by mandamus.

Judgment —In his judgment Lord *Mansfield* observed that “there is no doubt that where a party, who has a right, has no other specific legal remedy, the Court will assist him by issuing this prerogative writ in order to his obtaining such right.” After pointing out that the college was bound to admit all qualified, and to reject all unqualified, persons, Lord *Mansfield* declared that the determination of fitness lay in the discretion of the college, and the Court would not take it from them nor interrupt them in the *due and proper* exercise of it. “But their conduct in the exercise of this trust committed to them ought to be *fair, candid* and *unprejudiced*, not *arbitrary, capricious* or *biassed*, much less warped by *resentment* or *personal dislike*.”

"But in the present case they seem to have acted with candour and caution. Some of the gentlemen even make oath of their reasons against admitting this candidate for a licence. Objections to persons applying to practise physic may be grounded on a variety of reasons, and the Court are to judge of such objections and the reasons of them. If they are insufficient the Court may grant a mandamus. If they should refuse to examine the candidate at all, the Court would oblige them to do it. But the Court ought to be satisfied that they have ground to grant a mandamus. It is *not* a writ that is to issue *of course*, or to be granted *merely for the asking*.' He found that the *comitia majora* had the power to reject candidates, and that it did not appear that they had acted upon improper grounds or arbitrarily or capriciously, and there was no suggestion of corruption. There was therefore no ground for demanding a mandamus."

Note—The prerogative writ of mandamus was originally a mandate from the King directing the performance of some act desired by a subject. It was not a judicial writ, but merely a command issued directly by the King without the intervention of a Court. These letters mandate have long been obsolete, but the name attached to the judicial writs issued by the King's Bench, and known as "high prerogative writs," *i.e.*, as writs issuing, not as ordinary writs, as of right, but as writs issuing at the discretion of the King acting through that Court in which the King is supposed to be personally present. As Lord Mansfield said in *R v Barker* (1762), 1 W Bl 351: "A mandamus is certainly a prerogative writ, flowing from the King himself, sitting in this Court, superintending the police and preserving the peace of this country, and will be granted wherever a man is entitled to an office or a function, and there is no other adequate remedy for it."

The following rules have been deduced from the judicial decisions —

1. There must be a legal right on the part of the applicant to the performance by the person or body against whom he applies, of some duty of a public or quasi-public character.

As Lord Ellenborough, C J, said in *R v Archbishop of Canterbury* (1807), 8 East 213: "There ought in all cases to be a specific legal right, as well as the want of a specific legal remedy, in order to found

an application for a mandamus." But where the right is of a merely equitable character the writ will not be granted, however extreme the inconvenience of putting the applicant to seek relief in a Court of equity (*R v Godolphin* (1838), 8 A & E 338)

The legal right of the applicant and the legal duty of the defendant may arise from (1) statute, (2) charter, or (3) the common law or custom, and the duty must not be of a merely private character. As Lord Hardwicke, C J, said in *R v Wheeler* (1735), 104 temp Haid 99 "The reason why we grant these writs is to prevent a failure of justice and for the execution of the common law, or of some statute, or of the King's charter, and never as a private remedy to the party"

Thus the writ lies against any person, corporation or body of persons subject to the jurisdiction of the Court, and who are directly bound to perform some duty or function of a public or quasi-public nature

For instance, it lies against a county council (*Mayor of Salford v Lancashire County Council* (1890), 25 Q B D 384, 59 L J Q B 576 *R v Lord Leigh*, [1897] 1 Q B 132, 66 L J Q B 56), a district council, (*R v Leigh District Council*, [1898] 1 Q B 836, 67 L J Q B 562), a mayor and corporation (*R v Mayor of Exeter* (1868), L R 4 Q B 110), public companies, e.g., canal companies (*R v Wilts and Berks Canal Company* (1835), 3 Ad & El 477, 42 R R 445), dock companies (*R v Bristol Dock Company* (1841), 2 Q B 64, 57 R R 579), railway companies (*R v Gt Eastern Ry Co* (1841), 2 Q B 347, 11 L J Q B 66), churchwardens and overseers (*R v Wix* (1831), 2 B & Ad 197, 1 L J M C 36, 36 R R 545), vestries (*R v St Luke's, Chelsea* (1871), L R 7 Q B 148, 41 L J Q B 81)

The application for the writ is by motion in the King's Bench Division for an order nisi to a Divisional Court of the King's Bench Division (*Glossop v Heston Local Board* (1879), 12 Ch D 102, 49 L J Ch 89). The motion can only be made by counsel (*Ex p Whyte* (1896), 12 T L R 458)

2 A mandamus will not be granted where there is some other remedy equally convenient, beneficial or effective

In *R v Master of the Crown Office* (1913), 29 T L R 427, a rule had been granted calling upon the Master of the Crown Office to show cause why he should not summon a grand jury in order that the applicant might lay before it bills of indictment against persons who he alleged had broken the law. In refusing to make the rule absolute, *Pulford*, J, said that in order to obtain a mandamus an applicant must show that he had no other adequate remedy, and here he could prefer his indictments at the Central Criminal Court or the County of London Sessions, and it was not reasonable that a grand jury

should be summoned for him alone. Again, whenever the relief sought might be obtained by action the writ will be refused. A breach of the law of the land is the subject of an action. "The Court," said *Patteson, J.*, in *Ex p Robins* (1839), 7 Dowl 566, 54 R R 859, "will never grant a mandamus to enforce the general law of the land, which may be enforced by action."

3 There must have been a definite request for the performance of a duty, and a definite refusal to perform it.

In *R v Bristol and Exeter Ry Co* (1843), 4 Q B 162, 12 L J Q B 106, where, after the completion of the work to be performed, no specific demand to complete the works to be constructed in accordance with the provisions of the Bristol and Exeter Railway Act had been made, it was held that unless such demand be made after the completion of the work, and compliance be refused in terms or virtually, a mandamus will not be granted, although the statute has been palpably disobeyed.

4 A mandamus will not be granted where the defendant has refused to act after the exercise of a discretionary power.

R v The Army Council, Ex p Ravenscroft, [1917] 2 K B 504, 86 L J K B 1087, was an application for a rule nisi for a mandamus to the Army Council commanding them to cause a Court of inquiry to re-assemble to hear and determine, according to law, the case of Major Ravenscroft, on the grounds (1) that he was condemned without his defence being fully heard, and (2) that the statutory rules of procedure governing Courts of inquiry were not complied with.

An inquiry had been held by a military Court into the conduct of Ravenscroft and other officers with regard to complaints against them of excessive drinking by officers of the regiment to which they belonged. As a result Ravenscroft was placed on retired pay.

The rule, said Lord Reading, L C J, must be discharged because (1) the Court will not intervene in matters relating to military law prescribing rules for the guidance of officers. As *Willes, J.*, said in *Dawkins v Lord Rokeby* (1866), 45 L J Q B 8 "With respect to those matters placed within the jurisdiction of the military forces so far as soldiers are concerned military men must determine them." (2) Another and equally appropriate remedy was open to the officer under section 42 of the Army Act. (3) The power of the Army Council to assemble a Court of inquiry is a discretionary power, and the Court will not order an authority to exercise a discretion in a particular way. (4) The remedy by mandamus, if available, would in the circumstances be ineffective. See *Marks v Frogley*, [1898] 1 Q B 888, 67 L J Q B 605.

"In a matter affecting the discipline of the Army," said *Avory, J.*, "this Court cannot interfere by mandamus, prohibition or certiorari, at the suit of an officer or soldier, with the proceedings of a military Court of inquiry, or with any action that may be taken by the Army Council." See also *R v Registrar of Joint Stock Companies* (1888), 21 Q B D 131, 57 L J Q B 433, and *R v Christ's Hospital Governors*, [1917] 1 K B 19, 85 L J K B 1494.

5 A mandamus will only issue to command the doing of some act as opposed to the undoing or reversal of some act.

"We grant it," said Lord Campbell in *Ex p Nash* (1850), 19 L J Q B 296, 15 Q B 95, "when that has not been done which a statute orders to be done, but not for the purpose of undoing what has been done. We may, upon an application for a mandamus, entertain the question whether a corporation, not having affixed its seal, be bound to do so, but not the question whether, when they have affixed it, they have been right in doing so."

6 A mandamus will not be granted where the duty to be performed is in the circumstances impossible. In *Re Bristol and North Somerset Ry Co* (1877), 3 Q B D 10, 47 L J Q B 48, where the Board of Trade ordered the company to build a bridge in place of a level crossing, under the Railway Clauses Act, 1863, Cockburn, C J, in refusing a mandamus, said "It would be idle to make this rule absolute if in the end there would be no possibility of enforcing obedience." The company was virtually defunct. It had no power of raising money. Its share capital was spent and its borrowing powers exhausted. It had parted with the possession and use of the railway in perpetuity to the Great Western Railway Company. The company was bankrupt and had no funds or property, except that airy nothing—the reversion after a perpetuity. The Court could not put people in prison for not complying with an order when they had no means of doing so.

"To enforce by mandamus an order which imposes on a virtually defunct company a duty which it is impossible to discharge would be contrary to the elementary principles of justice." See also *R v L & N W Ry*, [1894] 2 Q B 512, 63 L J Q B 695.

7 The application for a mandamus must be made within a reasonable time.

Thus in *R v Halifax Road Trustees* (1848), 12 Q B 448, the defendants were by a local Act required to make a new road. The application for a mandamus was refused on the ground that the application was made twelve years after the passing of the Act, and seven years after the expiration of compulsory powers. The trustees

had done nothing whatever in the execution of their powers, but there was no explanation of the delay in making the application

8 The applicant must satisfy the Court that his motives are *bona fide*

In *R v Liverpool, Manchester & Newcastle Ry Co* (1852), 21 L J Q B 284, the Court refused a mandamus to compel the secretary of the company to register some shares purchased by the applicant. The construction of the undertaking had been abandoned, and 14s in the £ returned to the shareholders. It was held that the application was not made *bona fide*, but indirectly for an improper purpose

STATUTORY WRIT OF MANDAMUS

Croydon Corporation v. Croydon Rural District Council.

[1908] 2 Ch 321, 77 L J Ch 809ⁿ

Case] This was an action to recover the arrears of moneys due to the plaintiffs in respect of the special expenses for drainage works incurred by the plaintiffs for the benefit of the defendants, and for a mandamus to enforce the levy of a rate to satisfy them. The defendants admitted that the plaintiffs were entitled to judgment for the arrears, but contended that a retrospective rate would be illegal, and that in any event a mandamus ought not to be granted.

Judgment—The Court of Appeal held that it had a discretion to grant a mandamus for enforcing the levying of a rate to meet obligations for special expenses of former years if the circumstances justified it, although it is a general principle of rating law that the ratepayers of a subsequent year ought not to be called upon to bear the liabilities of an earlier year. It was also held that there was no reason for granting a mandamus to enforce payment of the arrears up to 1904, since by mistake the plaintiffs had omitted to call upon the defendants to pay them, but that inasmuch as a demand was made, and might have been complied with the subsequent year (1905), a mandamus was granted to enforce payment of the amount due for that period. See also *Wolstanton United U D C v Tunstall U D C*, [1910] 2 Ch 347.

Note—By section 68 of the Common Law Procedure Act, 1854, a plaintiff in any act in any of the superior courts might indorse upon the writ a notice that he intended to claim a writ of mandamus, and he might thereupon claim, either together with any other demand or separately, a writ of mandamus commanding the defendant to fulfil any duty in the fulfilment of which the plaintiff was personally

interests. It was held in *Benson v Paull* (1856), E & B 273, 25 L J Q B 274, 106 R R 596, that "the duty" must be one which might have been enforced by the prerogative writ, i.e., of a public or quasi-public character.

The statute having been repealed, Order LIII takes its place, and the decisions under the statute appear to apply to Rule 1 of the Order, which reads "The plaintiff in any action in which he shall claim a mandamus to command the defendant to fulfil any duty in the fulfilment of which the plaintiff is personally interested shall indorse such claim upon the writ of summons."

This action is not restricted to cases in which the prerogative writ would be granted, but it will not be granted where there is some other equally convenient, beneficial or effective remedy, and so in *Smith v Chorley District Council*, [1897] 1 Q B 532 and 678, 66 L J Q B 427, a mandamus was refused since the action would not lie and the proper remedy was the prerogative writ. For other instances of refusal see *Peebles v Oswaldtwistle U D C*, [1897] 1 Q B 625, 66 L J Q B 106, and *Davies v Gas Light and Coke Co*, [1909] 1 Ch 708, 78 L J Ch 160, 445.

PREROGATIVE WRIT OF CERTIORARI.

Regina v Surrey Justices

L R 5 Q B 466, 39 L J M C 145 (1870)

Case.] Here the justices had made orders certifying that certain roads were unnecessary, and directing that they should cease to be highways repairable by the parishes in which they were situate. It was found that in making these orders the justices had failed to comply with the provisions of the statute under which the orders were made. The applicant was one of the general public, and made use of the roads himself.

Judgment — It was held that the orders were void, as made without jurisdiction, and the writ was granted to quash the orders. "It is quite clear," said *Blackburn, J*, in delivering the judgment of the Court, "that, except when applied for on behalf of the Crown, the *certiorari* is not a writ of course. The Court must be satisfied on affidavit that there is sufficient ground for issuing it, and it must in every case be a question for the Court to decide whether in fact sufficient grounds do exist. In the very analogous one of prohibition a distinction is taken, thus expressed by *Cockburn, C J*, in *Forster v Forster* (1863), 32 L J Q B, at p 314, 'I entirely concur in the proposition that although the Court will listen to a person who is a stranger and who interferes to point out that some other Court has exceeded its jurisdiction, whereby some wrong or grievance has been sustained, yet that is not *ex debito justitiæ*, but a matter upon which the Court may properly exercise its discretion, as distinguished from the case of a party aggrieved, who is entitled to relief *ex debito justitiæ*, if he suffers from the usurpation of jurisdiction by another Court.' The same distinction between an

application by a party aggrieved and by one who comes merely, as a stranger to inform the Court is taken as to *certiorari* in *Arthur v Commissioners of Sewers* (1724), 8 Mod 331, where one of the Judges said 'that a *certiorari* was not a writ of right'

Where the party grieved has by his conduct precluded himself from taking an objection, the Court will not permit him to make it, as in *R v South Holland Drainage Committee* (1838), 8 L J Q B 64, 8 Ad & E 429, 47 R R 618. In other cases where the application is by the party grieved, so as to answer the same purpose as a writ of error, we think that it ought to be treated like a writ of error as *ex debito justitiæ*, but where the applicant is not a party grieved (who substantially brings error to redress his private wrongs), but comes forward as one of the general public having no particular interest in the matter, the Court has a discretion, and if it thinks that no good would be done to the public by quashing the order, it is not bound to grant it at the instance of such a person."

Note—This is a writ by which the King's Bench exercises its superintending power over inferior jurisdictions by requiring the Judges or officials of such jurisdictions to certify or send the proceedings before them into the King's Bench, either for the purpose of examining into the legality of such proceedings or for giving fuller or more satisfactory effect to them than could be done by the Court below. It is a general remedy applicable to all judicial decisions, and is an apt means for preventing the infliction or continuance of any wrong by an unwarrantable assumption of jurisdiction (*Re Clifford and O'Sullivan*, [1921] 2 A C 570, 90 L J P C 244) or excess of jurisdiction (*Re Penny* (1857), 26 L J Q B 225, 7 El & Bl 660). But it is less generally used now, owing to the appellate jurisdiction of Quarter Sessions and the practice of appeal to the Divisional Court by special case stated upon a question of law (*R v Chantrel* (1875), 44 L J Q B 167, L R 10 Q B 587). It is still, however, an instrument whereby the decisions and orders of justices of the peace may be reviewed by the King's Bench. The writ cannot be refused upon the application of the Attorney-General (*Re Lord Eastowel's Fishery* (1875), 1r R 9 C L 46).

PREROGATIVE WRIT OF PROHIBITION

Mackonochie v Lord Penzance

50 L J Q B 611, 6 App Cas 425, (1881)

Case.] The Rev Alexander H Mackonochie having been suspended *ab officio et beneficio* for three years under the Church Discipline Act for contumacy by Lord Penzance, Dean of Arches, was granted a rule *nisi* for a prohibition, which was made absolute by the Divisional Court. This judgment was reversed by the Court of Appeal. Upon appeal to the House of Lords it was held that this was a matter of ecclesiastical procedure only, and was not therefore the subject of a proceeding in prohibition. The suspension was only a step in the proceedings, which had been regularly instituted, and was in itself perfectly regular.

Judgment—In his judgment Lord Selborne, L.C., said that the question resolved itself into one of the proper course, practice and procedure of an ecclesiastical Court, in a cause of which that Court had proper cognisance against a person, and in a matter properly subject to its jurisdiction. Such a question ought to be determined in the ecclesiastical and not in any temporal forum, notwithstanding the fact that, by a sentence of suspension *a beneficio*, temporal rights held by an ecclesiastical tenure, in consideration and upon the condition of the performance of ecclesiastical duties, are necessarily affected. Supposing no statute to intervene, the ecclesiastical Courts must have jurisdiction to determine questions of this nature, and if they have jurisdiction, prohibition does not lie to them from the temporal Courts. The remedy (if there be any error in judgment) is by appeal to the Judicial Committee of the Privy Council.

MacKnochie, concluded the Lord Chancellor, had failed to show that the provisions of either of the statutes on which he relied were in any way contravened by the suspension of a clerk in holy orders *ab officio et beneficio*, for contumacy in disobeying a monition, forming part of a decree having the force of a definite sentence, pronounced against him in a suit regularly instituted under the Church Discipline Act, the sentence of suspension being pronounced in the same suit, and that this is nothing more than a question of ecclesiastical procedure

Note—This writ may be issued by any of the Courts of the High Court of Justice, directed to any inferior Courts (including ecclesiastical Courts) for the purpose of preventing them from usurping a jurisdiction with which they are not legally endowed—in other words, to compel them to keep within their jurisdiction. It is a preventive rather than a corrective measure. It is used only to prevent the commission of intended acts, and not to undo acts already committed. It differs from an injunction inasmuch as the latter is directed to one of the parties. A prohibition is directed to the Court itself. The proceedings to be prohibited must be of a judicial character. *Ex p Death* (1852), 18 Q B 647, 21 L J Q B 337, 88 R R 731. It may issue out of the common law Courts to the Judicial Committee of the Privy Council. *Ex p Smythe* (1835), 2 C M & R 748, 5 L J Ex 33, 42 R R 513. In modern times the writ has been of service in checking the incursions of Government Departments into the province of the judiciary. For instance, it was said (*R v Local Government Board* (1882), 10 Q B D 309, 52 L J M C 4) that in certain circumstances the writ might issue against the Board. In his judgment, *Brett*, L J, said "My view of the power of prohibition at the present day is that the Court should not be chary of exercising it, and that wherever the Legislature entrusts to any body of persons other than to the superior Courts the power of imposing an obligation upon individuals the Courts ought to exercise as widely as they can the power of controlling those bodies of persons if those persons admittedly attempt to exercise powers beyond the powers given to them by Act of Parliament."

If the absence or excess of jurisdiction is not apparent on the face of the pleadings the grant of the writ is discretionary (*Broad v Perkins*, (1888), 21 Q B D 533, 57 L J Q B 638), but if it is

patent, it is of course (*R v Tristram*, [1902] 1 K B 816, 71 L J K B 418)

Any Divisional Court of the High Court may hear an application for a prohibition. From a Judge of the Admiralty Division an appeal lies direct to the Court of Appeal. In practice, however, these applications are usually made on the Crown side of the King's Bench Division. The applicant may either apply to the Divisional Court by notice of motion or to a Judge in chambers by summons.

* * * * *

These three writs form part of the machinery for maintaining the principle of equality before the law. Every exercise of authority must be lawful, and the question of legality or illegality can only be determined in a properly constituted Court, and by the ordinary legal procedure. It is contrary to the fundamental principles of the English constitution and of English law to admit administrative law or to allow administrative Courts. As it is only the King in Parliament who can legislate, so it is only the King in Court who can determine the law. See Shott, *Informations, Mandamus and Prohibition*, Short & Mello, *Practice of the Crown Office*, *Annual Practice*, Mews' *Digest*, Robinson, *Public Authorities and Legal Liabilities*.

PREROGATIVE WRIT OF QUO WARRANTO, AND QUO WARRANTO INFORMATIONS

Regina v. McGowan

11 A & E 869, 9 L J Q B 244 (1840)

Case.] By 5 & 6 Will 4, c 76, the election of a mayor on November 9 must precede that of the aldermen, and a prior election of the latter is void. Here the defendant at a meeting held at 10 a m, on November 9, 1838, was elected an alderman, and at a quarterly meeting of the borough council, held at 12 noon on the same day, was elected mayor, and thereupon assumed office and acted therein. Upon an information in the nature of a *quo warranto* for exercising the office of Mayor of Exeter

Held.—That the meeting appointed to be held on November 9 in every year for the election of mayor ought to be the first, if not the only meeting on that day, and that the first act to be done by it ought to be the election of a mayor. The election of aldermen before that of mayor was void, and that the defendant in both his capacities had been ill-elected, and shows no good title to his office.

Note.—An information in the nature of a *quo warranto* is founded on the ancient prerogative writ of *quo warranto*, which is now obsolete. The latter was in the nature of a writ of right for the King against anyone claiming or usurping any office, franchise or liberty, to inquire by what authority such person supported his claim.

An information is now exhibited either by the Attorney-General *ex officio* or in the name of the King's Coroner and Attorney, at the instance of a private prosecutor by leave of the Court. The information will not lie against a usurpation of a merely private nature unconnected with the public government (*R v Ogden* (1829), 10 B & C

233, 34 R. R. 375), nor against a mere servant of a corporation (*R v Corporation of Bedford Level* (1805), 6 East 356). The test is whether the office is of a public nature and not merely ministerial. It was held by the House of Lords in *R v Darley* (1845), 12 Cl & F 520, that a proceeding by information in the nature of *quo warranto* will lie for usurping office, whether created by charter of the Crown alone or by the Crown with the consent of Parliament, provided the office be of a public nature and a substantive office, and not merely the function or employment of a deputy or servant held at the will and pleasure of others. In delivering the opinion of the Judges, Tindal, L. C. J., said: "The mode of proceeding by information, in the nature of *quo warranto*, came, no doubt, in the place of the ancient writ of *quo warranto*. This writ was brought for property of, or franchises derived from the Crown. The earliest is to be found in 9 Richard I (*Abbreviatio Placit* p. 21), and is against the incumbent of a church calling upon him to show *quo warranto* he holds the church. Then follow many others, in the time of John, Henry III and Edward I, for lands, for view of frankpledge, for return of writs, holding of pleas, free warren, plain-age and prisage (*Abbrev Placit* p. 210), emendation of assize of bread and beer, pillory and tumbrel and gallows. Some of these are offices or in the nature of offices, as in the instances of returns of writs and holding of Courts.

"The practice of filing informations of this sort by the Attorney-General in lieu of those writs is very ancient, and in *Coke's* entries are many precedents of such informations against persons for usurping the same sorts of franchises, as claiming to be a corporation, to have waifs, strays, holding a court leet, court baron, pillory and tumbrel, markets, prison, or for usurping a public office, as the conservator of the Thames and coal and corn measures.

"It is only in modern times that informations have been exhibited by the King's coroner and attorney. The first reported case is that of *The King v Mayor of Hertford*, 1 Lord Raym. 426, in 10 Will. 3. And it is a mistake to suppose that these informations were founded on the statute of 9 Anne, *The King v Gregory*, 4 T. R. 240 n., and *The King v Williams*, 1 Burr. 402, where the right to file an information at common law, by the coroner and attorney against a person for holding a criminal Court of record, was recognised.

"After the statute of 4 & 5 Will. & Mar. c. 18, which restrained the filing of informations by the coroner and attorney, the sanction of the Court was required, and after that statute and the 9 Anne, c. 20, it exercised a discretion to grant or refuse them to private prosecutors according to the nature of the case."

The *Zamora*.

[1916] 2 A C 77, 2 P Cas 1, 85 L. J P 89

Case] *The Zamora* was a Swedish steamship (and therefore neutral) bound from New York to Stockholm. On April 18, 1915, she was stopped by a British cruiser and sent with a prize crew to Barrow-in-Furness for search. Here she was seized as prize and placed in the custody of the Marshal. On May 14, 1915, a writ was issued by H M's Procurator-General, claiming confiscation of the vessel and cargo, and on the 14th *Evans*, P, at his instance, made an order under Order XXIX, R 1, of the Prize Court Rules, 1914, giving leave to the War Department to requisition copper, part of the cargo subject to an undertaking under note 5 thereof for payment into Court of the appraised value. From this order the Swedish owners appealed.

Judgment—*Jord Parker*, in delivering the opinion of the Judicial Committee, pointed out that Order XXIX, R 1, was an imperative direction to the Court, and if it was to be construed as binding it could only be so by virtue of some power vested in the King in Council otherwise than by virtue of the Prize Court Act, 1894. It was contended by the Attorney-General that the King in Council has such a power by virtue of the Royal prerogative.

"The idea that the King in Council, or, indeed, any branch of the Executive has power to prescribe or alter the law to be administered by Courts of law in this country is out of harmony with the principles of our constitution. It is true that under a number of modern statutes various branches of the Executive have power to make rules having the force of statutes, but all such rules derive their validity from the statute which creates the power, and not from the executive body by which they are made. No one would contend that the prerogative involves any power to prescribe or alter the law administered in Courts of common law and

equity If it is, however, suggested that the manner in which Prize Courts in this country are appointed and the nature of their jurisdiction differentiate them in this respect from other Courts

“Prior to the Naval Prize Act, 1864 (27 & 28 Vict c 25), jurisdiction in matters of prize was exercised by the High Court of Admiralty by virtue of a commission issued by the Crown under the Great Seal at the commencement of each war The commission, no doubt, owed its validity to the prerogative, but it cannot on that account be properly inferred that the prerogative extended to prescribing or altering the law to be administered from time to time under the jurisdiction thereby conferred The Courts of common law and equity in like manner originated in an exercise of the prerogative The form of commission was always substantially the same

It required and authorised the Court ‘to proceed upon all and all manner of captures, seizures, prizes and reprisals, of all ships and goods, that are or shall be taken, and to hear and determine, according to the course of the Admiralty and the law of nations’ *Lando v Rodney* (1782), 2 Dougl 614 n

“In the first place all those matters upon which the Court is authorised to proceed are, or arise out of, acts done by the sovereign power in right of war It follows that the King must, directly or indirectly, be a party to all proceedings in a Court of Prize In such a Court his position is, in fact, the same as in the ordinary Courts of the realm upon a petition of right which has been duly filed Rights based on sovereignty are waived, and the Crown for most purposes accepts the position of an ordinary litigant A Prize Court must, of course, deal judicially with all questions which come before it for determination, and it would be impossible for it to act judicially if it were bound to take its orders from one of the parties to the proceedings

“In the second place, the law which the Prize Court is to administer is not the national, or, as it is sometimes called, the municipal law, but the law of nations—in other words,

international law' It is worth while dwelling for a moment on this distinction Of course, the Prize Court is a municipal Court, and its decrees and orders owe their validity to municipal law The law which it enforces may therefore in one sense be considered a Branch of municipal law Nevertheless, the distinction between municipal and international law is well defined A Court which administers municipal law is bound by and gives effect to the law as laid down by the sovereign State which calls it into being It need only inquire what that law is, but one which administers international law must ascertain and give effect to a law which is not laid down by any particular State, but originates in the practice and usage long observed by civilised nations in their relations towards each other or in express international agreement It is obvious that, if and so far as a Court of Prize in this country is bound by and gives effect to orders of the King in Council purporting to prescribe or alter international, it is administering not international but municipal law, for an exercise of the prerogative cannot impose legal obligations on anyone outside the King's dominions who is not the King's subject If an Order in Council were binding on the Prize Court, such Court would be compelled to act contrary to the express terms of the commission from which it derived its commission "

* * * * *

"It cannot, of course, be disputed that a Prize Court, like any other Court, is bound by the legislative enactments of its own sovereign State A British Prize Court would certainly be bound by the Acts of the Imperial Legislature But it is none the less true that if the Imperial Legislature passed an Act, the provisions of which were inconsistent with the law of nations, the Prize Court, in giving effect to such provisions, would no longer be administering international law It would in the field covered by such provisions be deprived of its proper function as a Prize Court The fact, however,

that the Prize Courts in this country would be bound by Acts of the Imperial Legislature affords no ground for arguing that they are bound by the executive orders of the King in Parliament "

After referring to the opinion of the Law Officers on the Silesian Loan in 1753, the judgment of Lord *Stowell* in *The For* (1811), Edw Adm Cas 311, and to the power of making rules as to the procedure and practice of Prize Courts conferred by the Prize Court Act, 1894, "their lordships are of opinion that the latter power does not extend to prescribing or altering the law to be administered by the Court; but merely giving such executive directions as may from time to time be necessary "

By the Judicature Acts, 1873 and 1891, the High Court of Justice is substituted for the Court of Admiralty as the permanent Court of Prize

It was further held (1) that the Prize Court was not bound, even in doubtful cases, to take its directions from the Crown "It must itself determine what the law is, the best of its ability, and its view, with whatever limitations it be arrived at, must prevail over any Executive order", (2) that, although the Prize Court is not bound by Orders in Council, it will not ignore them altogether Where they amount to a mitigation of the Crown rights in favour of the enemy or neutral the Court will act on them

Note —Whatever may be the theory, the Prize Courts throughout the world, with the one great exception of the German Prize Courts, purport to, and, in fact, do, administer international law And this is so by reason of the case There are two parties in prize, the captor State, appearing as an individual litigant, and the enemy or neutral owner International law is equally binding upon both parties alike, but municipal law does not bind the enemy or neutral Prize Courts derive their jurisdiction over foreigners, not from municipal law, which is powerless to confer it, but from the consent of nations This case confirms the principle laid down in 1615 in *Day v Savage*, *supra*, that no one, not even the King, can be Judge in his own cause, and decides that all Courts of law are bound by an Act of the King in Parliament But it is pointed out that if a Prize Court acted upon

such an Act it would cease to function as a Prize Court. Moreover, Lord Stowell, in *The Fox*, assumed that the King in Council could not have intended such a result by the Orders issued in consequence of the Berlin and Milan Decrees, and so to day the Courts would assume, where possible, that Parliament did not intend such a result.

The Parlement Belge

5 P D 197 (1880)

Case] Proceedings were commenced in the Admiralty Division against the *Parlement Belge* to recover damages in respect of a collision in Dover Harbour with the steam tug *Daring*. No appearance having been entered on behalf of the *Parlement Belge*, it was sought to issue a warrant of arrest against her. Thereupon a protest was entered on behalf of the Attorney-General, asserting that the Court had no jurisdiction, since the vessel was the property of the King of the Belgians, and was therefore entitled to be treated as a public vessel of the State, that the *Parlement Belge* was a mail-packet, running between Ostend and Dover, and employed in a service which was the subject of a convention made in 1876 between Great Britain and Belgium, that she was the property of the King of the Belgians, and carried the royal pennon, and that she was at the time in the possession and employment of the Belgian Government, and under the charge of Belgian naval officers, although, in fact, carrying merchandise and passengers for hire, in addition to the mails. This protest was overruled, but on appeal judgment was reversed and the vessel held exempt from local jurisdiction.

Judgment—*Brett*, L J (Lord *Esher*), in delivering the judgment of the Court of Appeal, after referring to the facts and reviewing the authorities, said that “the principle to be deduced from all these cases is that, as a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign State to respect the independence and dignity of every other sovereign

State, each and every one declines to exercise by means of its Courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other State, or over the public property of any State which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador or property be within its territory, and therefore, but for the common agreement, subject to its jurisdiction.

It was held, moreover, that in such cases the immunity so established could not be defeated by proceedings *in rem*, directed merely against the property, since by such proceedings the owner of the property would, nevertheless, be indirectly impleaded. The effect of such proceedings against the property of a foreign sovereign would be, in fact, to call upon him either to sacrifice his property or his independence, and to place him in that position was virtually a breach of the principle upon which his immunity from jurisdiction was based.

The second question was whether such immunity had been lost by reason of the vessel having been used for trading purposes. As to this, it must be maintained either that the vessel had been so used as to have been employed substantially as a mere trading vessel, and not substantially for national purposes, or else that a use of her in part for trading purposes took away the immunity, even though she remained in the possession of the sovereign authority by the hands of commissioned officers, and was substantially in use for national purposes. As to the first of these contentions the vessel in the present case had been declared by the sovereign of Belgium to be in his possession, and to be a public vessel of the State. It was difficult to see how any Court could inquire into the correctness of such a declaration without bringing the sovereign under its jurisdiction. It had been held in the case of *The Exchange* (1812), 7 Cranch, 116, that if a vessel were declared by the sovereign authority to be a ship of war, that declaration could not be inquired into, and the question whether a public ship, not being a ship of war, was used for

national purposes appeared to come within the same rule. But even if such an inquiry could be instituted, it seemed to the Court in the present case that the vessel had been mainly used for the purpose of carrying the mails, and only sub-ordinately for trading purposes, and hence she did not fall within the first contention.

As to the second, it had frequently been stated that an independent sovereign could not be sued personally, even though he might have carried on a private trading venture; and the same rule applied to an ambassador, for the reason that in either case such a suit would be inconsistent with the independence and equality of the State which such sovereign or ambassador represented. In the present case, however, it appeared to the Court that the vessel had been used only subordinately and partially for trading purposes, and that this did not take away her general immunity.

Note—The principle thus laid down was followed in *The Jassy*, [1906] P 270, 75 L J P 93, *The Gagara*, [1919] P 95, and *The Porto Alexandre*, [1920] P 30, 89 L J P 97. In the last-named case the Court of Appeal, affirming *Hill, J*, held that a sovereign State could not be impleaded either by being served *in personam* or indirectly by proceedings *in rem*, and if that were so it mattered not how the property was being employed. The Supreme Court of the United States came to substantially the same conclusion in *The Pesaro* (1926), 46 Sup Ct 611. By the Brussels Convention of 1926, however, this immunity has been very considerably curtailed. A State engaging in commerce has been placed upon the same footing as a private shipowner or shipper. By Art 1 *Les navires de mer appartenant aux Etats ou exploites par eux, les cargaisons leur appartenant, les cargaisons et passagers transportes par les navires d'Etat de même que les Etats qui sont propriétaires de ces navires ou qui les exploitent, ou qui sont propriétaires de ces cargaisons, sont soumis, de ces navires ou au transport de ces cargaisons, aux mêmes règles de responsabilité et aux mêmes obligations que celles applicables aux navires, cargaisons et armements privé*."

Walker v Baird and another

[1892] A C 491, 61 L J P C 92

Case] This was an action of trespass originally brought by Baird and another (the present respondents) against Walker, the commander of H M S Emerald (the present appellant), for entering and taking possession of certain lobster factories belonging to the respondents on the coast of Newfoundland. The appellant pleaded, in substance, that he had acted under the orders of the Crown for the purpose of enforcing a convention or *modus vivendi*, which had been entered into with the French Government, for regulating the conduct of the lobster fisheries on certain parts of the coast of Newfoundland, that such agreement had provided, *inter alia*, that no lobster factories not in operation on July 1, 1887, should be permitted, except by the joint consent of the commanders of the British and French naval stations, that the lobster factories of the respondents had been carried on in contravention of such agreement, that the appellant in doing the acts complained of had acted in a public capacity, and in the discharge of the authority committed to him by the Crown, and that such acts had been confirmed and approved by the Crown, and, finally, that any such acts, being matters of State arising out of political relations between Her Majesty and the French Republic, and involving as they did the construction of treaties and of the *modus vivendi*, were "acts of State," and matters which could not be inquired into by the Court. On appeal to the Privy Council it was held, affirming the judgment of the Supreme Court of Newfoundland, that the defence alleged disclosed no answer to the action.

Judgment —Lord *Herschell*, in delivering the opinion of the Privy Council, said it was laid down that on the facts disclosed the respondent must succeed, unless it could be shown that, as a matter of law, the appellant's acts could be

justified on the ground of having been done by the authority of the Crown, and for the purpose of carrying out a treaty entered into between the Crown and a foreign Power. The suggestion that the appellant's acts could be justified as "acts of State," and that the Court was not competent to inquire into a matter involving the construction of treaties or similar acts, was dismissed as wholly untenable. It was pointed out that it had been admitted in argument that the broad proposition that the Crown could sanction an invasion by its officers of the rights of private individuals, whenever this might be necessary in order to compel obedience to the provisions of a treaty, could not be maintained. Nevertheless, it had been contended that, inasmuch as the power of making treaties belonged to the Crown, there must necessarily reside in the Crown a power of compelling its subjects to obey the provisions of a treaty made for the purpose of putting an end to a state of war. It had been further contended that if this were so, then such power must also extend to the provisions of a treaty having for its object the preservation of peace, and that an agreement which was made to avert a war which was imminent must be regarded as akin to a treaty of peace, and as being subject to the same constitutional rule. Whether such a power did exist in the case of treaties of peace, whether it existed in the case of treaties akin to treaties of peace, and whether, finally, in both or either of such cases interference with private rights could be authorised otherwise than by legislation, were grave questions on which the Judicial Committee did not find it necessary to express an opinion; but they agreed with the Court below, in thinking that the allegations contained in the statement of defence did not bring the case within the limits for which alone the appellant's counsel had contended.

Note—It is now established that the Crown or executive is not entitled by virtue of any provisions in a treaty not ratified by Parliament to modify or interfere with or derogate from the rights of the subject arising under the law of the land. But the inability of the

Courts to give effect to international obligations as against subjects does not have the effect of relieving the State from its international responsibility for their non-fulfilment

Re The Lord Bishop of Natal

3 Moo P C C (N S) 115, 146 R R 18 (1864)

Case.] By letters patent Queen Victoria, in exercise of her authority as sovereign and head of the Established Church, created a metropolitan and two suffragan bishops of Grahams-town and Natal, with episcopal jurisdiction and authority in the Colony of the Cape of Good Hope, which had at that time a Legislative Council and a House of Assembly, and in the Colony of Natal, which had a Legislative Council. By the letters patent the suffragan bishops were declared subject to the metropolitan, who, in his turn, was declared subject to the Archbishop of Canterbury. The letters patent were not issued by Order in Council or by virtue of an imperial statute, nor were they confirmed by the Legislature of the Cape of Good Hope or by the Legislative Council of Natal.

In 1863 charges of heresy and false doctrine were preferred against the Bishop of Natal, who was deposed and prohibited from the exercise of any divine office within any part of the metropolitan province of the colony by the metropolitan bishop.

Judgment—Lord *Chelmsford*, L C, in delivering the opinion of the Judicial Committee, said since the bishops held their dioceses under grants made by the Crown, their status, both ecclesiastical and temporal, must be ascertained and defined by the law of England, and that their legal existence depended on acts which had no validity or effect except on the basis of the supremacy of the Crown. Three questions arose (1) Were the letters patent valid and good in law? (2) If, assuming the ecclesiastical relation of metropolitan and suffragan to have been created, was the grant of coercive

authority and jurisdiction expressed by the letters patent valid and good in law? and (3) Could the oaths of canonical obedience taken by the Bishop of Natal confer any jurisdiction or authority on the metropolitan by which the sentence of deprivation could be supported?

First, it was clear upon principle "that after the establishment of an independent Legislature in the Cape of Good Hope and Natal there was no power in the Crown by virtue of its prerogative to establish a metropolitan see or province, or to create an ecclesiastical corporation whose status, rights and authority the colony could be required to recognise"

Secondly, assuming that the letters patent were sufficient in law to confer on the Bishop of the Cape of Good Hope the ecclesiastical status of a metropolitan, it was quite clear that the Crown had no power to confer any jurisdiction or coercive legal authority upon the metropolitan over the suffragan bishops or over any other person

"It is a settled constitutional principle or rule of law, that although the Crown may by its prerogative establish Courts to proceed according to the common law, yet that it cannot create any new Court to administer any other law, and it is laid down by Lord Coke, in the 4th Institute, that the creation of a new Court with a new jurisdiction cannot be made without Act of Parliament

"It cannot be said that any ecclesiastical tribunal or jurisdiction is required in any colony or settlement where there is no Established Church, and in the case of a settled colony the ecclesiastical law of England cannot for the same reason be treated as part of the law which the settlers carried with them from the mother country

"There is, therefore, no power in the Crown to create any new or additional ecclesiastical tribunal or jurisdiction, and the clauses which purport to do so, contained in the letters patent, are simply void in law. No metropolitan or bishop in any colony having legislative institutions can, by virtue of the Crown's letters patent alone (unless granted by an Act of

Parliament, or confirmed by a colonial statute) exercise any coercive jurisdiction or hold any Court or tribunal for that purpose "

Thirdly, that the oath of canonical obedience taken by the suffragan bishop did not confer on the metropolitan any jurisdiction or authority, and even if the parties intended to enter into any such agreement, it was not legally competent to the parties to give or receive such a voluntary or consensual jurisdiction. The attempt to give appellate jurisdiction to the Archbishop of Canterbury was equally invalid.

Such an important question as the present could be decided only by the sovereign as head of the Established Church and depositary of the ultimate appellate jurisdiction.

"Before the Reformation, in a dispute of this nature between two independent prelates, an appeal would have lain to the Pope, but all appellate authority of the Pope over members of the Established Church is by statute vested in the Crown.

"It is the settled prerogative of the Crown to receive appeals in all colonial causes, and by the 25 Hen 8, c 19 (by which the mode of appeal to the Crown in ecclesiastical causes is directed), it is by the fourth section enacted that 'for lack of justice at or in any of the Courts of the Archbishops of this realm or in any part of the King's dominions, it shall be lawful to the parties grieved to appeal to the King's Majesty in the King's Court of Chancery,' an enactment which gave rise to the Commission of Delegates, for which "the Judicial Committee of the Privy Council is now substituted by 3 & 4 Will 4, c 41 "

The proceedings therefore taken by the metropolitan and the judgment or sentence pronounced by him against the Bishop of Natal were null and void in law.

RIGHT OF PEER TO WRIT OF SUMMONS

Viscountess Rhondda's Claim

[1922] 2 A C 389 *House of Lords Committee for Privileges*

Case.] Margaret Haig Viscountess Rhondda, wife of Sir Humphrey Mackworth, Bart, a peeress of the United Kingdom in her own right, presented a petition praying that His Majesty might be pleased to order a writ of summons to Parliament to be issued to her

By letters patent, dated June 19, 1918, the petitioner's father was created first Viscount Rhondda, with special remainder in default of male issue to the petitioner and the heirs male of her body, and the grant contained a clause granting to the first peer and his male issue and in default of such issue the heirs male of the petitioner the right to have, hold, and possess a seat, place and voice in the Parliaments and public assemblies and councils of the King, his heirs and successors within the United Kingdom amongst other viscounts, as viscounts of Parliaments and public assemblies and councils

On the death of the first viscount, in July, 1918, without having had any male issue, the petitioner succeeded to the title

The petitioner based her claim to receive a writ of summons to Parliament in the right of her said dignity upon section 1 of the Sex Disqualification (Removal) Act, 1919 (9 & 10 Geo 5, c 71), which provides that "a person shall not be disqualified by sex or marriage from the exercise of any public function or from being appointed to or holding any civil or judicial office or post "

The petition was referred to the Committee for Privileges which, on March 2, 1922, reported in favour of the claim, but on March 30, on the motion of the Lord Chancellor, the report was referred back to the committee for reconsideration, and on May 18 the case was re-argued.

Judgment—By a majority of 22 to 4 it was held by the Committee for Privileges that a peeress of the United Kingdom in her own right is not entitled by virtue of section 1 of the Sex Disqualification (Removal) Act, 1919, to receive a writ of summons to Parliament.

In the course of his judgment Lord Birkenhead, L C, said "the case for the petitioner is that, immediately before the passing of the Sex Disqualification (Removal) Act she would have been entitled but for her sex to receive a writ of summons and to take her seat in the House of Lords accordingly, that the incapacity to receive the writ was a disqualification to exercise a public function, and that this disqualification was removed by the passing of that Act."

It rested therefore upon Lady Rhondda to show (1) that she was, but for the suggested disqualification, entitled to the writ, and (2) that that disqualification was removed by the statute.

The letters patent provide as follows "Willing that the said David Alfred, Baron Rhondda and his heirs male aforesaid and in default of such issue the heirs male of the said Margaret Haig Mackworth and every of them successively and respectively may have hold and possess a seat place and voice in the Parliaments and public assemblies and Councils of us our heirs and successors within the United Kingdom of Great Britain and Ireland among other Viscounts as Viscounts of Parliaments and public assemblies and Councils."

"It is clear that according to the ordinary principles of construction and apart altogether from such disqualifications as are imposed by common law, she is incapable of receiving a writ by reason of the terms of the patent itself."

It is said that the form of the patent makes no difference that every holder of a peerage dignity is entitled *ex debito justitiæ* to a writ of summons, and that the combined effect of that which is said and that which is unsaid is either an impossible stretch of the Royal Prerogative or merely surplusage, that the right to sit is by the law of Parliament so inextricably interwoven with the dignity that the King cannot confer the latter without the former, though until the passing of the Act of 1919 the common law disqualification by sex prevented this doctrine from having any practical effect

Such a grant is to be construed most strictly against the grantee and most beneficially for the Crown. As was said in *Feather v The Queen* (1865), 6 B & S 257 "In grants from the Crown nothing passes except that which is expressed or which is a matter of necessary and unavoidable intentment in order to give effect to the plain and undoubted intention of the grant. And in no species of grant does this rule of construction more especially obtain than in grants which emanate from, and operate in derogation of, the prerogative of the Crown."

It was settled in *Bristol's Case* (1626), 3 Lords' Jour p 544, that the King was not entitled to withhold a writ of summons from a peer of the realm. "But to say that because any peer who is capable of sitting is entitled *ex debito justitiæ*, therefore the petitioner is entitled to a writ, is to beg the question. The writ is not to be issued capriciously or withheld capriciously at the pleasure of the sovereign or of this House. It is to be issued or withheld according to the law relating to the matter, and if under that law it appears there is a debt of justice to the petitioner in the matter, the writ will issue, and if not, it cannot issue."

* After referring to the *Wiltes Peerage* (1869), L R 4 H L 126, and the *Buckhurst Peerage* (1876), 2 App Cas 1—in the latter of which Lord Cairns said "It is the well-established and constitutional law of the country that a

peerage, partaking of the qualities of real estate, must be made in its limitation by the Crown, so far as it is descendible, descendible in a course known to the law"—Lord *Birkenhead* directed attention to the *Wensleydale Peerage* (1856), 5 H L C 958, where Lord *Cranworth*, L C, said "That which gives every noble lord the right to sit here is not his patent of nobility, but the writ of summons which he is entitled to in consequence of that patent" "Here," said Lord *Campbell*, "the patent must be produced and read to verify the right of the claimant to take his place. If it confers such a dignity as by law gives a right to sit here, he must be admitted. The right to sit in Parliament does not necessarily follow from the creation of a barony, and Baron *Wensleydale's* patent in consequence contains an express grant of that right" "It was not denied," says Pike, *Const Hist of House of Lords*, p 378, "that the Crown might confer upon the subject the title of baron for his life, but it was not admitted that the Crown could in this manner give him a place in the House of Lords"

"What then," asks Lord *Birkenhead*, "becomes of the suggestion that the right to sit is not a right granted by letters patent? Literally it is true. The letters patent require the supplement of a writ. But they give a right to demand that writ and impose a liability to receive it and to act upon it. The letters are read in order to see whether there has been granted by them to the person who presents the writ the right to receive the writ and to sit under it."

"A peerage held by a peeress in her own right is one to which in law the incident of exercising the right to receive a writ is not, and never was, attached. A right to sit and vote is personal to the holder of a peerage who possesses it. It is a right which can neither be denied nor surrendered nor exercised by deputy." A minor, a felon, a bankrupt is not entitled to receive a writ whilst under disability. Such disability may be discharged, "but a person who is a female

must remain a female till she dies. Apart from a change in the law she could not, before 1919, both be a woman and participate in the legislative proceedings of the House of Lords. By her sex she is not—except in a wholly loose and colloquial sense—disqualified from the exercise of this right. In respect of her dignity she is a subject of rights which *ex vi termini* cannot include this right.” *Chorlton v Lings* (1868), L R 4 C P 374

“The question is, what right does the common law attach to the peerage in respect of sitting and voting? Is it the right to do so absolutely, or is it the right to do so being a man? In other words, before it can be stated that the female holder of a peerage dignity is entitled *ex debito justitiae* to the issue of a writ, you must determine what is the obligation of justice in respect of such a holder of a peerage dignity. What matters is the quality and capacity of the holder in the concrete, and not the general incidents of peerage in the abstract

“A peeress in her own right is not a person who has an incident of peerage but is disqualified from exercising it by her sex. She is a person who for her life holds a dignity which does not include the right of a female to exercise that function at all”

The writ of summons is imperative. “It does not purport to confer a right or privilege, but to demand the fulfilment of a duty”

The words in the present statute are vague and general. But wherever the Legislature has dealt with the right or duty of attending in the House of Lords or voting for election to the House of Commons it is with meticulous care that it has expressed its will upon the matter. For instance, by the Parliament (Qualification of Women) Act, 1918 (8 & 9 Geo 5, c 47), “A woman shall not be disqualified by sex or marriage for being elected to or sitting or voting as a member of the Commons House of Parliament”

“Nor does the matter stop there. The Representation of

the People Act, 1918, deals specially with the position of the petitioner and of all other peeresses in their own right, and enacts by section 9, sub-section 5, that 'any incapacity of a peer to vote at an election arising from the status of a peer shall not extend to peeresses in their own right' This section created a class of persons who, holding peerage dignities, though they were not peers of Parliament, were to possess the privilege of voting at a parliamentary election. It is now suggested (indeed it is necessary for the petitioner to contend) that the Act of 1919 conferred upon this class the additional privilege of sitting in the House of Lords."

The committee was asked to say that by such general words the Legislature intended to create for the first time a body of persons who might concurrently sit in the one House and vote for the other. A long stream of cases had established that general words are to be construed so as "to pursue the intent of the makers of statutes" *Stradling v Morgan* (1560), 1 Plowd 203, *Hawkins v Gathercole* (1855), 6 De G M & G 1, *Eyston v Studd* (1573), 1 Plowd 459, *Chorlton v Lings*, *supra*, *Beresford-Hope v Sandhurst* (1889), 23 Q B D 79, *Nairn v University of St Andrew*, [1909] A C 147.

The statute of 1919 "commences in general words by removing a disability, it then proceeds by words which may be thought particular to remove disqualifications for holding civil or judicial posts, or civil professions or vocations, or admission to incorporated societies, and, lastly, it deals with the position of women under the law relating to juries. It is even so precise in its language as to make it clear that when it is dealing with admission to an incorporated society it includes such a society, whether it has been incorporated by royal charter or otherwise—a respect for the sanctity of those august bodies which, upon the contention of the petitioner, the Legislature has not thought fit to pay to the higher House of Parliament."

The words of the jury summons are imperative. The words of a summons to the House of Lords are also imperative.

Attendance in both is a duty, and such duty enforceable by fine

It seemed impossible to suppose that the Legislature when endeavouring to confer upon women a privilege which was coupled with a duty could have used words which were so loose as respects the privilege and so inapt as respects the duty, and this view seemed to be put beyond all argument by the words used with regard to jury service

For these reasons his lordship found no difficulty upon the construction of the statute alone in reporting to the House against the petitioner. It was sufficient to say that the Legislature could not be taken to have departed from the usage of centuries or to have employed such loose and ambiguous words to carry out so momentous a revolution in the constitution of the House of Lords

Note—Reference should be made to the dissenting opinions of Viscount *Haldane* and Lord *Wrenbury*. No Court, said the latter, will be bound to follow the present case as any authority upon the true construction of the Sex Disqualification (Removal) Act, 1919, because the Committee for Privileges is a mixed tribunal of laymen and lawyers. Lord *Birkenhead's* opinion, however, is an invaluable analysis of the law relating to the right of a peer to a writ of summons

TRADE UNIONS

The Trade Unions and Trades Disputes Bill, 1927, deals with intimidation and the right to strike

ILLEGAL STRIKES

By section 1, sub section 1, "It is hereby declared that any strike is illegal if it has any object other than or in addition to the furtherance of a trade dispute within the trade or industry in which the strikers are engaged, and is a strike designed or calculated to coerce the Government either directly or by inflicting hardship upon the community, and it is further declared that it is illegal to commence, or continue, or to apply any sums in furtherance or support of any such illegal strike"

A lock-out is also declared illegal in similar circumstances "For the purposes of the foregoing provisions a trade dispute shall not be deemed to be within a trade or industry unless it is a dispute between employers and workmen, or between workmen and workmen, in that trade or industry, which is connected with the employment or non-employment or the terms of the employment, or with the conditions of labour, of persons in that trade or industry"

A person instigating others to take part in an illegal strike or lock-out is liable to fine or imprisonment, "Provided that, no person shall be deemed to have committed an offence under this section or at common law by reason only of his having ceased work or refused to continue to work or to accept employment

"(3) Without prejudice to the generality of the expression "trade or industry" workmen shall be deemed to be within the same trade or industry if their wages or conditions of employment are determined in accordance with the conclusions of the same joint industrial council conciliation board, or other similar body or in accordance with agreements made with the same employer or group of employers

"(4) The provisions of the Trades Disputes Act, 1906, shall not nor shall the second proviso to sub-section (1) of section two of the Emergency Powers Act, 1920, apply to any act done in contemplation or furtherance of a strike or lock-out which is by this Act declared to be illegal, and

any such act shall not be deemed for the purpose of any enactment to be done in contemplation or furtherance of a trade dispute "

By section 2 persons refusing to take part in an illegal strike or lock out are protected

By section 8, sub-section 2, the expression "strike" is defined as "the cessation of work by a body of persons employed acting in combination or a concerted refusal or a refusal under a common understanding of any number of persons, who are, or have been, employed, to continue to work or to accept employment," and a lock out as "the closing of a place of employment or the suspension of work, or the refusal by an employer to continue to employ any number of persons employed by him in consequence of a dispute, done with a view to compelling those persons, or to aid another employer in compelling persons employed by him, to accept terms or conditions of or affecting employment "

PREVENTION OF INTIMIDATION, ETC

"Section 3—(1) It is hereby declared that it is unlawful for one or more persons (whether acting on their own behalf or on behalf of a trade union or of an individual employer or firm, and notwithstanding that they may be acting in contemplation or furtherance of a trade dispute) to attend at or near a house or place where a person resides or works or happens to be, for the purpose of obtaining or communicating information or of persuading or inducing any person to work or to abstain from working, if they so attend in such numbers or otherwise in such manner as to be calculated to intimidate any person in that house or place, or to obstruct the approach thereto or egress therefrom, or to lead to a breach of the peace, and attending at or near any house or place in such numbers or in such manner as is by this sub section declared to be unlawful shall be deemed to be a watching or besetting of that house or place within the meaning of section seven of the Conspiracy and Protection of Property Act, 1875 "

"(2) In this section the expression 'to intimidate' means to cause in the mind of a person a reasonable apprehension of injury to him or to any member of his family or of violence or damage to any person or property, and the expression 'injury' includes injury other than physical or material injury

"(3) In section seven of the Conspiracy and Protection of Property Act, 1875, the expression 'intimidate' shall be construed as having the same meaning as in this section

"(4) Notwithstanding anything in any Act it shall not be lawful for one or more persons, for the purpose of inducing any person to work

or to abstain from working, to watch or beset a house or place where a person resides or the approach to such a house or place, and any person who acts in contravention of this sub-section shall be liable on summary conviction to a fine not exceeding twenty pounds or to imprisonment for a term not exceeding three months."

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